

(29,516, 29,803)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 273

**THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
AND FRANK WHITE, AS TREASURER OF THE UNITED
STATES OF AMERICA, APPELLANTS,**

vs.

FREDERICK Y. ROBERTSON

FILED APRIL 3, 1923

No. 493

FREDERICK Y. ROBERTSON, APPELLANT,

vs.

**THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
AND FRANK WHITE, AS TREASURER OF THE UNITED
STATES OF AMERICA**

FILED AUGUST 10, 1923

**APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

INDEX

	Original	Print
Record from U. S. district court for the southern district of New York.....	1	1
Præcipe for subpœna.....	1	1
Subpœna and service.....	2	1
Bill of complaint.....	4	2
Exhibit B to Bill—Ore contract between Mammoth Copper Mining Co. and Beer, Sondheimer & Co.....	15	7

	Original	Print
Motion to dismiss.....	22	11
Notice of motion to dismiss.....	23	12
Memorandum decision, Knox, J.....	25	12
Order allowing filing of amended petition.....	26	13
Amended bill of complaint.....	28	13
Exhibit B to Bill—Ore contract between Mammoth Copper Mining Co. and Beer, Sondheimer & Co., August 26, 1914.....	40	19
Order denying motion to dismiss.....	47	23
Order of substitution.....	49	23
Notice of motion for supplemental subpoena.....	50	24
Affidavit of Charles W. Stockton.....	52	24
Order for transmission of supplemental subpoena.....	58	27
Notice of motion for order for transmission.....	60	28
Order for transmission of supplemental subpoena.....	62	28
Affidavit of Charles W. Stockton.....	64	29
Order for publication of supplemental subpoena.....	68	31
Affidavit of Charles W. Stockton.....	70	31
Supplemental subpoena.....	72	32
Affidavits of service.....	74	33
Answer to amended bill of complaint.....	81	35
Pro confesso order.....	89	39
Affidavit of Charles W. Stockton.....	91	39
Affidavit of M. M. Messinger, Jr.....	94	41
Notice of motion to strike out.....	96	41
Motion to strike out.....	97	42
Order on motion to strike out.....	98	42
Second amended bill of complaint.....	100	43
Exhibit B to Second Amended Bill—Ore contract be- tween Mammoth Copper Mining Co. and Beer, Sond- heimer & Co., August 26, 1914.....	112	49
Answer to second amended bill.....	119	52
Opinion, Hand, J.....	126	56
Interlocutory decree.....	139	62
Master's report.....	142	64
Plaintiff's Exhibit 123—Memorandum of amount claimed to be due from Beer, Sondheimer & Co... ..	161	73
Plaintiff's exceptions to master's report.....	198	92
Defendants' exceptions to master's report.....	200	93
Notice of motion to sustain defendants' exceptions.....	203	94
Notice of motion for leave to enter supplemental bill.....	204	94
Affidavit of Frederick Y. Robertson.....	206	95
Affidavit of Harland B. Tibbetts.....	209	96
Order confirming master's report.....	211	97
Opinion, Hand, J.....	213	98
Order of substitution.....	218	100
Final decree.....	219	101
Defendants' petition for appeal.....	221	102
Defendants' assignment of errors.....	224	103
Order allowing defendants' appeal.....	245	114
Citation on defendants' appeal..... (omitted in printing) ..	247	115

INDEX

iii

	Original	Print
Defendants' notice of appeal.....	248	115
Plaintiff's petition for appeal.....	250	116
Plaintiff's assignment of error.....	251	116
Order allowing plaintiff's appeal.....	255	118
Citation on plaintiff's appeal.....(omitted in printing)..	256	118
Plaintiff's notice of appeal.....	257	118
Note of evidence taken before Judge Hand.....	260	119
Testimony of George W. Metcalf.....	261	119
Testimony of Frederick Y. Robertson.....	268	124
Offers in evidence.....	268	124
Testimony of Frederick Lyon.....	286	133
George W. Metcalf (recalled).....	290	136
George W. Heintz.....	332	160
George W. Metcalf (recalled).....	353	173
Herbert Salinger.....	356	174
Benno Elkan.....	361	178
A. P. Anderson.....	370	183
Frederick Lyon (recalled).....	374	185
Sidney J. Jennings.....	377	187
W. H. Eardley.....	383	191
George W. Metcalf (recalled).....	399	201
Note of evidence taken before special master.....	409	206
Offers in evidence.....	410	206
Testimony of George W. Metcalf.....	419	211
Walter H. Eardley.....	546	286
George W. Metcalf (recalled).....	634	337
Walter H. Eardley (recalled).....	643	342
Norman J. Simpson.....	643	342
John Laurie.....	676	363
George W. Metcalf (recalled).....	688	369
Walter H. Eardley (recalled).....	729	392
John Laurie (recalled).....	754	408
Walter H. Eardley (recalled).....	781	424
John Laurie (recalled).....	800	435
Edwin Anderson.....	803	437
Notary's certificate.....(omitted in printing)..	821	447
Stipulation re testimony of George Blow.....	824	447
Testimony of George Blow.....	826	448
Plaintiff's Exhibit 2—Letter, dated September 16, 1914, from Beer, Sondheimer & Co. to Herbert Salinger....	842	457
Plaintiff's Exhibit 3—Telegram, dated August 26, 1914, from Beer, Sondheimer & Co. to Herbert Salinger....	843	458
Plaintiff's Exhibit 4—Telegram, dated February 23, 1915, from Herbert Salinger to W. H. Eardley.....	843	458
Plaintiff's Exhibit 5—Reply telegram, dated February 24, 1915, from W. H. Eardley to Herbert Salinger....	844	458
Plaintiff's Exhibit 6—Letter, dated January 20, 1915, from Herbert Salinger to G. W. Metcalf.....	845	459
Plaintiff's Exhibit 7—Letter, dated January 27, 1915, from G. W. Metcalfe to Herbert Salinger.....	846	459

	Original	Print
Plaintiff's Exhibit 8—Letter, dated September 9, 1914, from Beer, Sondheimer & Co. to Herbert Sallinger...	847	460
Plaintiff's Exhibit 9—Statement of freight rates.....	849	461
Plaintiff's Exhibit 10—Tariff references accompanying Exhibit 9.....	850	461
Plaintiff's Exhibit 31—Tabulation of ore received and paid for by Beer, Sondheimer & Co., shipped from Kennett mine.....	852	463
Plaintiff's Exhibit 50—Letter, dated August 29, 1914, from United States Smelting Co. to B. Elkan.....	853	464
Plaintiff's Exhibit 51—Telegram, dated September 4, 1914, from Beer, Sondheimer & Co. to W. H. Eardley.	854	464
Plaintiff's Exhibit 52—Assignment of cause of action to F. Y. Robertson.....	855	465
Plaintiff's Exhibit 53—Telegram, dated March 17, 1915, from Beer, Sondheimer & Co. to Mammoth Copper Mining Co.....	856	466
Plaintiff's Exhibit 54—Telegram, dated March 23, 1915, from Beer, Sondheimer & Co. to Mammoth Copper Mining Co.....	856	466
Plaintiff's Exhibit 55—Telegram, dated March 24, 1915, from Beer, Sondheimer & Co. to Mammoth Copper Mining Co.....	857	466
Plaintiff's Exhibit 56—Telegram, dated May 14, 1915, from United States Smelting Co. to Beer, Sondheimer & Co.....	857	466
Plaintiff's Exhibit 57—Telegram from Beer, Sondheimer & Co. to United States Smelting Co.....	858	466
Plaintiff's Exhibit 58—Letter, dated May 15, 1915, from Mammoth Copper Mining Co. to Beer, Sondheimer & Co.	859	467
Plaintiff's Exhibit 59—Letter, dated June 16, 1915, from Mammoth Copper Mining Co. to Beer, Sondheimer & Co.....	860	467
Plaintiff's Exhibit 60—Letter, dated July 12, 1915, from Mammoth Copper Mining Co. to Beer, Sondheimer & Co.....	861	468
Plaintiff's Exhibit 61—Letter, dated August 5, 1915, from Mammoth Copper Mining Co. to Beer, Sondheimer & Co.....	862	469
Plaintiff's Exhibit 62—Excerpt from report of Allen Property Custodian.....	863	469
Plaintiff's Exhibit 63—Telegram, dated October 22, 1914, from Beer, Sondheimer & Co. to Herbert Sallinger; telegram, dated October 22, 1914, from Herbert Sallinger to Beer, Sondheimer & Co.; telegram, dated October 23, 1914, from Beer, Sondheimer & Co. to Herbert Sallinger.....	887	486
Plaintiff's Exhibit 64—Telegram, dated November 23, 1914, from Herbert Sallinger to Beer, Sondheimer & Co.; telegram, dated November 19, 1914, from Beer, Sondheimer & Co. to H. Sallinger.....	889	487

INDEX

	Original	Print
Plaintiff's Exhibit 65—Letter, dated January 20, 1915, from Herbert Salinger to G. W. Metcalf.....	890	488
Plaintiff's Exhibit 66—Letter, dated January 27, 1915, from G. W. Metcalfe to Herbert Salinger.....	891	488
Plaintiff's Exhibit 67—Letter, dated July 21, 1915, from United States Smelting Co. to G. W. Metcalf.....	892	489
Plaintiff's Exhibit 68—Letter, dated March 8, 1916, from United States Smelting Co. to G. W. Metcalf..	894	490
Plaintiff's Exhibit 69—Letter, dated March 20, 1916, from United States Smelting Co. to G. W. Metcalfe..	896	490
Plaintiff's Exhibit 70—Letter, dated July 23, 1914, from United States Smelting Co. to American Metal Co., Ltd., Denver, Colo.....	897	491
Plaintiff's Exhibit 71—Letter, dated July 25, 1914, from American Metal Co., Ltd., Denver, Colo., to George W. Heintz.....	898	492
Plaintiff's Exhibit 72—Telegram, dated March 31, 1915, from B. Elkan to Geo. W. Heintz.....	899	492
Plaintiff's Exhibit 73—Telegram, dated March 31, 1915, from G. W. Heintz to B. Elkan.....	900	493
Plaintiff's Exhibit 74—Telegram, dated February 23, 1915, from Herbert Salinger to W. H. Eardley.....	901	493
Plaintiff's Exhibit 75—Telegram, dated February 24, 1915, from W. H. Eardley to Herbert Salinger.....	902	493
Plaintiff's Exhibit 76-A—Letter, dated July 28, 1914, from W. H. Eardley to M. Schott.....	902	494
Plaintiff's Exhibit 77-A—Letter, dated July 20, 1914, from American Metal Co., Ltd., Denver, Colo., to United States Smelting Co.....	904	494
Plaintiff's Exhibit 78-A—Letter, dated July 21, 1914, from American Metal Co., Ltd., Denver, Colo., to W. H. Eardley.....	905	495
Plaintiff's Exhibit 79-A—Letter, dated July 27, 1914, from United States Smelting Co. to American Metal Co., Ltd., Denver, Colo.....	906	496
Plaintiff's Exhibit 80-A—Letter, dated July 30, 1914, from American Metal Co., Ltd., Denver, Colo., to W. H. Eardley.....	907	496
Plaintiff's Exhibit 81—Letter, dated August 4, 1914, from United States Smelting Co. to American Metal Co., Denver, Colo.....	908	497
Plaintiff's Exhibit 82—Letter, dated August 6, 1914, from American Metal Co., Ltd., Denver, Colo., to W. H. Eardley.....	909	497
Plaintiff's Exhibit 83—Letter, dated August 8, 1914, from ——— to American Metal Co., Ltd., Denver, Colo.	910	498
Plaintiff's Exhibit 84—Letter, dated August 12, 1914, from American Metal Co., Ltd., to W. H. Eardley...	910	498
Plaintiff's Exhibit 85—Letter, dated August 14, 1914, from ——— to American Metal Co., Denver, Colo.	912	499

	Original	Print
Plaintiff's Exhibit 86—Letter, dated August 25, 1914, from United States Smelting Co. to G. W. Metcalfe.	913	499
Plaintiff's Exhibit 87—Letter, dated March 25, 1915, from United States Smelting Co. to American Metal Co., Ltd., Denver, Colo.....	915	500
Plaintiff's Exhibit 88—Letter, dated March 25, 1915, from ——— to American Metal Co., Ltd., Denver, Colo.	916	500
Plaintiff's Exhibit 89—Letter, dated April 1, 1915, from American Metal Co., Ltd., to United States Smelting Co.....	917	501
Plaintiff's Exhibit 90—Letter, dated April 5, 1915, from United States Smelting Co. to American Metal Co., Ltd., Denver, Colo.....	919	502
Plaintiff's Exhibit 91—Letter, dated April 14, 1915, from United States Smelting Co. to American Metal Co., Ltd., Denver, Colo.....	920	502
Plaintiff's Exhibit 92—Letter, dated April 17, 1915, from American Metal Co., Ltd., to United States Smelting Co.....	921	503
Plaintiff's Exhibit 93—Letter, dated April 24, 1915, from American Metal Co., Ltd., Denver, Colo., to United States Smelting Co.....	923	504
Plaintiff's Exhibit 94—Letter, dated April 5, 1915, from W. H. Eardley to G. W. Metcalfe.....	924	504
Plaintiff's Exhibit 95—Letter, dated April 10, 1915, from G. W. Metcalfe to United States Smelting Co...	926	505
Plaintiff's Exhibit 96—Letter, dated February 24, 1915, from W. H. Eardley to G. W. Metcalfe.....	928	505
Plaintiff's Exhibit 97—Letter, dated February 22, 1915, from G. W. Metcalfe to United States Smelting Co...	929	506
Plaintiff's Exhibit 110—Statement of various ores pur- chased under contracts, showing amount shipper would receive on 14-cent spelter market.....	931	507
Plaintiff's Exhibit 111A—Agreement, dated June 28, 1915, between United States Smelting Co. and Butte & Superior Copper Co., Ltd.....	932	507
Plaintiff's Exhibit 111B—Agreement, dated June 21, 1915, between United States Smelting Co. and Butte & Superior Co.....	939	511
Plaintiff's Exhibit 111C—Contract, dated August 12, 1915, between estate of Patrick Clark and United States Smelting Co.....	944	514
Plaintiff's Exhibit 111D—Contract, dated July 2, 1915, between Bolivar Mining & Tunnel Transportation Co. and United States Smelting Co.....	950	517
Plaintiff's Exhibit 111E—Contract, dated August 10, 1915, between Victor Reduction Co. and United States Smelting Co.....	954	519
Plaintiff's Exhibit 111F—Contract, dated December 18, 1915, between Pingrey Mines & Ore Reduction Co. and United States Smelting Co.....	960	523

INDEX

vii

	Original	Print
Plaintiff's Exhibit 111G—Contract, dated June 29, 1915, between United States Smelting Co. and Big Four Exploration Co.....	964	524
Plaintiff's Exhibit 111H—Contract, dated — day of November, 1915, between United States Smelting Co. and Butte & Superior Copper Co., Ltd.....	970	528
Plaintiff's Exhibit 111I—Contract, dated October 4, 1915, between F. J. Lyons and United States Smelting Co.	976	531
Plaintiff's Exhibit 111J—Series of telegrams and letters between Poland Mining Co. and United States Smelting Co.....	979	533
Plaintiff's Exhibit 111K—Contract, dated September 8, 1915, between Silverton Mines, Ltd., and United States Smelting Co.....	984	535
Plaintiff's Exhibit 112—Statement of various ores bought on a flat price showing price of spelter at time of purchase and the smelter margin as compared with the smelter margin on Kennett ores and at contract terms at the same price of spelter.....	990	539
Plaintiff's Exhibit 113A—Series of letters and telegrams between Consolidated Interstate-Callahan Mining Co. and United States Smelting Co.....	991	540
Plaintiff's Exhibit 113B—Contract, dated January 24, 1916, between W. Fletcher & Son, Ltd., and United States Smelting Co.....	1000	544
Plaintiff's Exhibit 113C—Contract, dated November 26, 1915, between Randolph-Gemmill Development Co. and United States Smelting Co.....	1003	545
Plaintiff's Exhibit 113D—Contract, dated February 17, 1916, between Carnegie Lead & Zinc Co. and United States Smelting Co.....	1006	547
Plaintiff's Exhibit 115—Statement as to the prices paid by United States Zinc Co. and their comparison with prices paid the Mammoth Copper Mining Co. by United States Smelting Co.....	1012	550
Plaintiff's Exhibit 118—Letter, dated October 4, 1915, from United States Smelting Co. to Mammoth Copper Mining Company—Clearing account vouchers.....	1014	551
Plaintiff's Exhibit 127—Stipulation concerning two actions, one brought in the State of Utah and one brought in the New York supreme court.....	1038	594
Schedule A to Exhibit 127—Complaint in district court of Salt Lake County.....	1041	596
Schedule B to Exhibit 127—Summons and complaint in supreme court of New York.....	1047	598
Defendants' Exhibit A Before Master—Compilation showing earnings of Altoona plant from July 1, 1915, to September 30, 1916.....	1057	602
Defendants' Exhibit B Before Master—Compilation of earnings at Iola plant for February and March, 1916.	1061	606

	Original	Print
Defendants' Exhibit C Before Master—Volume of cost sheets	1066	610
Defendants' Exhibit D—Letter, dated July 28, 1914, from United States Smelting Co. to B. Elkan.....	1066	610
Defendants' Exhibit E—Letter, dated October 14, 1914, from United States Smelting Co. to Beer, Sondheimer & Co.....	1068	611
Defendants' Exhibit F—Letter, dated November 2, 1914, from Mammoth Copper Mining Co. to Beer, Sondheimer & Co.....	1069	612
Defendants' Exhibit G—Letter, dated November 13, 1914, from Beer, Sondheimer & Co. to United States Smelting Co.....	1070	612
Defendants' Exhibit H—Letter, dated December 4, 1914, from United States Smelting Co. to Beer, Sondheimer & Co.....	1071	613
Defendants' Exhibit I—Telegram, dated October 22, 1914, from Herbert Salinger to Mammoth Copper Mining Co.....	1072	613
Defendants' Exhibit J—Telegram, dated October 22, 1914, from G. W. Metcalfe to Herbert Salinger.....	1072	613
Defendants' Exhibit K—Telegram, dated October 24, 1914, from Herbert Salinger to Mammoth Copper Mining Co.....	1073	614
Defendants' Exhibit L—Telegram, dated October 26, 1914, from G. W. Metcalfe to Herbert Salinger.....	1073	614
Defendants' Exhibit M—Telegram, dated November 20, 1914, from Herbert Salinger to Mammoth Copper Mining Co.....	1074	614
Defendants' Exhibit N—Telegram, dated November 23, 1914, from G. W. Metcalfe to Herbert Salinger.....	1074	614
Defendants' Exhibit O—Letter, dated April 6, 1915, from Beer, Sondheimer, & Co. to Mammoth Copper Mining Co.....	1075	615
Defendants' Exhibit P—Letter, dated April 15, 1915, from Mammoth Copper Mining Co. of Maine to Beer, Sondheimer & Co.....	1076	616
Defendants' Exhibit Q for Identification—Telegram, dated May 25, 1915, from United States Smelting Co. to Beer, Sondheimer & Co.....	1078	616
Defendants' Exhibit R for Identification—Letter, dated May 7, 1915, from United States Smelting Co. to National Zinc Co.....	1078	617
Defendants' Exhibit S—Contract, dated June 10, 1914, between United States Smelting Co. and American Metal Co., Ltd.....	1079	617
Defendants' Exhibit T—Letter, dated July 15, 1914, from U. S. Smelting Company to American Metal Company	1088	622
Defendants' Exhibit U—Tabulation of average weekly quotations for East St. Louis spelter as published by the Engineering and Mining Journal.....	1089	622

INDEX.

ix

	Original	Print
Defendants' Exhibit V—9th annual report of United States Smelting, Refining & Mining Co. for the year ending December 31, 1914.....	1092	624
Defendants' Exhibit W—10th annual report of United States Smelting, Refining & Mining Co. for year ending December 31, 1915.....	1116	637
Defendants' Exhibit X—Letter, dated March 29, 1915, from American Metal Co., Ltd., Denver, Colo., to American Metal Co., Ltd., New York city.....	1141	650
Defendants' Exhibit Y—Letter, dated April 1, 1915, from American Metal Co., Ltd., Denver, Colo., to American Metal Co., Ltd., 61 Broadway, New York city	1142	651
Defendants' Exhibit Z—Copy of telegram, July, 1914, signed by Putzel.....	1143	651
Defendants' Exhibit A1—Copy of telegram, July, 1914, signed by Putzel.....	1143	652
Stipulation as to proofs.....	1144	652
Stipulation as to transcript of record.....	1155	658
Clerk's certificate.....	1156	658
Stipulation and order re testimony, etc.....	1157a	659
Proceedings in C. C. A.....	1158	660
Opinion, Manton, J.....	1158	660
Decree	1172	669
Notice of appeal by Thos. W. Miller et al.....	1174	669
Petition of Thos. W. Miller et al. for appeal and supersedeas...	1175	670
Order allow appeal and supersedeas of Miller et al.....	1178	671
Assignment of errors by Miller et al.....	1180	672
Clerk's certificate.....	1197	683
Citation and service.....(omitted in printing)..	1198	684
Notice of appeal by F. Y. Robertson.....	1200	684
Petition of F. Y. Robertson for appeal and supersedeas.....	1202	685
Order allowing appeal of F. Y. Robertson.....	1204	686
Assignment of errors by F. Y. Robertson.....	1205	686
Bond on appeal.....(omitted in printing)..	1207	688
Stipulation as to record on appeal.....	1209	688
Clerk's certificate.....	1210	688
Citation and service.....(omitted in printing)..	1213	689
Stipulation re supplemental transcript.....	1215	689

1971

1972

1973

1974

1975

1976

1977

1978

1979

1980

1981

1982

1983

1984

1985

1986

1987

1988

1989

1990

1991

1992

1993

1994

1995

1996

1997

1998

[fol. 1] **DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK**

PRÆCIPE FOR SUBPŒNA

FREDERICK Y. ROBERTSON, Plaintiff,

against

**A. MITCHELL PALMER, as Alien Property Custodian, and JOHN
BURKE, as Treasurer of the United States of America, Defendants**

To Alexander Gilchrist, Jr., Clerk U. S. District Court, Southern
District of New York:

You will please issue a subpoena to the defendant in the above
entitled action.

Charles W. Stockton, Solicitor for Plaintiff, Office and Post
Office Address, 49 Broadway, New York City.

New York, Nov. 26, 1918.

[fol. 2] **IN UNITED STATES DISTRICT COURT**

SUBPŒNA AND SERVICE

The President of the United States of America to A. Mitchell Palmer,
as Alien Property Custodian, and John Burke, as Treasurer of the
United States of America, Greeting:

You are hereby commanded to appear before the Judges of the
District Court of the United States of America for the Southern
District of New York, in the Second Circuit, to answer a bill of
complaint exhibited against you in the said Court in a suit in Equity,
by Frederick Y. Robertson, and to further do and receive what the
said Court shall have considered in this behalf; and this you are not
to omit under the penalty on you and each of you of Two hundred
and fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court
of the United States for the Southern District of New York, at the
City of New York, on the 26th day of November in the year one
thousand nine hundred and eighteen and of the Independence of
the United States of America the one hundred and forty-third.

Alex. Gilchrist, Jr., Clerk. Charles W. Stockton, Plaintiff's
Solicitor.

[fol. 3] The defendants are required to file their answer or other
defense in the above cause in the Clerk's office of this Court, on or
before the 20th day after service hereof, excluding the day of said
service; otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

(On the reverse side)

U. S. Marshal's Office

Washington, D. C., December 2, 1918.

Served copy of the within subpoena together with a copy of the bill of complaint in this case on A. Mitchell Palmer, Alien Property Custodian, and John Burke, Treasurer of the United States, personally, this date.

Maurice Splain, U. S. Marshal, District of Columbia.

[fol. 4] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Frederick Y. Robertson, a citizen of the State of New York, residing in the Southern District thereof, brings this suit against A. Mitchell Palmer, a citizen and resident of the State of Pennsylvania, as Alien Property Custodian, duly qualified and acting under the Federal statute approved October 6, 1917, and known as the "Trading with the Enemy Act," and against John Burke, a citizen and resident of the State of North Dakota, as Treasurer of the United States of America.

First. That this suit is between citizens of different states and the sum or amount in controversy largely exceeds the sum or value of three thousand dollars, exclusive of costs and interest.

[fol. 5] Second. That this suit arises under the laws of the United States and this Court has jurisdiction hereof under said laws, and especially under an Act of Congress approved October 6, 1917, and known as the "Trading with the Enemy Act."

Third. That the plaintiff is a citizen and resident of the State of New York and is not, and has not at any time herein mentioned been, an enemy or an ally of an enemy, within the meaning of the said Act of Congress.

Fourth. That the Mammoth Copper Mining Company of Maine is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Maine and neither said corporation nor any of its stockholders is or at any time has been an enemy or ally of an enemy as defined in said Act.

Fifth. Upon information and belief that Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are

and at all times hereinafter mentioned were citizens of Germany, residents of Frankfort-on-the-Main, Germany alien enemies of the United States, as defined by the said Act, and co-partners, doing business under the name and style of Beer, Sondheimer & Company, and that the home office of the said firm is and at all such times was at Frankfort-on-the-Main, Germany.

Sixth. That A. Mitchell Palmer is and at all times since on and before the first day of January, 1918, was the Alien Property Custodian, duly appointed, qualified and acting under and pursuant to the provisions of said "Trading with the Enemy Act" and as such [fol. 6] and on or about the 22nd day of July, 1918, seized and now has in his custody and possession or under his control, the money and property in the United States due or belonging to said alien enemies or of which said alien enemies are the owners or in which they have a substantial interest, and he now has and retains possession and custody thereof.

Seventh. Upon information and belief, that John Burke is and at all times hereinafter mentioned was the Treasurer of the United States of America, duly appointed, qualified and acting as such, and that as such Treasurer and under and pursuant to certain provisions of said Act known as the Trading with the Enemy Act, he has received and now has in his possession or custody certain moneys, constituting part of the property of the alien enemies herein mentioned.

Eighth. That the said co-partnership firm of Beer, Sondheimer & Company on and for a long time previous to the 29th day of September, 1914, and for approximately one year thereafter was engaged in business in the State of New York and elsewhere in the United States of America under the firm name of Beer, Sondheimer & Company, and that at all such times its business in New York City was conducted by or through certain managers or agents, to-wit, Benno Elkan and Otto Frohnknecht.

Ninth. That on or about the 29th day of September, 1914, the Mammoth Copper Mining Company of Maine and said co-partnership firm Beer, Sondheimer & Company duly entered into a certain [fol. 7] contract in writing, subscribed by the said Mammoth Copper Mining Company of Maine and by said Beer, Sondheimer & Company as of date August 26, 1914, a copy of which said contract is annexed hereto, marked Exhibit "B" and made a part hereof.

Tenth. That by the terms of said contract the Mammoth Copper Mining Company of Maine contracted to sell and deliver to the said Beer, Sondheimer & Company at the smelting works of the said firm at Bartlesville in the State of Oklahoma or at such other works as the said Beer, Sondheimer & Company might designate, and the said Beer, Sondheimer & Company contracted to purchase and receive from the said Mammoth Copper Mining Company of Maine, all of the zinc crude ore running not less than thirty-three per cent. metallic zinc which the Mammoth Copper Mining Company of Maine

produced at and shipped from its said mine and property between the said 29th day of September, 1914, and a date being one year after the date of the first shipment made after the completion of the picking plant which the Mammoth Copper Mining Company of Maine contemplated building. That the said picking plant was completed and the first shipment thereafter made on February 26, 1915.

Eleventh. Upon information and belief, that between the said 29th day of September, 1914, and the 26th day of February, 1916, the Mammoth Copper Mining Company of Maine produced and shipped from its said mine and property ten thousand nine hundred and seventh-four and three hundred thirteen thousandths (10,974.313) [fol. 8] tons of said zinc crude ore, none of which ran less than thirty-three per cent. metallic zinc; and that the said co-partnership firm Beer, Sondheimer & Company accepted and received from the Mammoth Copper Mining Company of Maine one thousand four hundred forty-eight and three hundred eighty-two thousandths (1,448.382) tons of said zinc crude ore and paid therefor at the prices stated in said contract the sum of Thirty Thousand nine hundred ninety-seven and eighty-one hundredths (\$30,997.81) Dollars.

Twelfth. Upon information and belief, that the said Mammoth Copper Mining Company of Maine duly offered to deliver the remaining nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said zinc crude ore to the said Beer, Sondheimer & Company at its said smelting works at Bartlesville, Oklahoma, or at any other works that the said firm might designate, but that the said Beer, Sondheimer & Company refused to receive the said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore or any part thereof and refused to pay for the same or any part of it or to perform its said agreement in any respect further than performed as hereinbefore alleged, although the Mammoth Copper Mining Company of Maine duly tendered said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore to said Beer, Sondheimer & Company and has duly requested said Beer, Sondheimer & Company to accept the same and pay therefor and has otherwise in all respects complied with and performed, or tendered performance of, the pro-[fol. 9] visions of the said contract, by it to be performed.

Thirteenth. That after the said Beer, Sondheimer & Company had refused to accept the said ore as hereinabove alleged, the Mammoth Copper Mining Company of Maine sold the said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore for the best obtainable prices and at the then market value, to wit, for the sum of Two hundred thirty-eight thousand two hundred seventy-eight and seventy-six hundredths (\$238,278.76) Dollars.

Fourteenth. That the amount which was due to be paid to the Mammoth Copper Mining Company of Maine by said Beer, Sondheimer & Company for said nine thousand five hundred twenty-five

and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore at the prices stipulated in said contract is the sum of Five hundred eleven thousand one hundred three and sixty-four hundredths (\$511,103.64) Dollars.

Fifteenth. That the difference between said amount and the amount realized by the Mammoth Copper Mining Company of Maine in the sale of nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore on the market is Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight hundredths (\$272,824.88) Dollars.

Sixteenth. That by reason of the premises and of the assignment [fol. 10] hereinafter referred to to this plaintiff, said alien enemies became and are indebted, jointly and severally, to the plaintiff in the sum of Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight hundredths (\$272,824.88) Dollars, with interest from the dates payment became due under said contract to September 4, 1916, amounting to Sixteen thousand three hundred forty-two and fifty-four hundredths (\$16,342.54) Dollars, no part of which has been paid, though duly demanded.

Seventeenth. That on or about the 25th day of August, 1915, a corporation under the name of Beer, Sondheimer & Company, Inc., was organized under the laws of the State of New York, which took over and thereafter conducted all of the business in the United States of the said co-partnership firm or a very large part thereof, and that the said Benno Elkan and Otto Frohnknecht, who had theretofore conducted and managed the business of the said co-partnership firm of Beer, Sondheimer & Company, became respectively the President and Vice-President of the said domestic corporation Beer, Sondheimer & Co., Inc., and continued the operations and business theretofore conducted by and for the said co-partnership firm in the same offices at 61 Broadway, New York, as theretofore occupied by the said co-partnership firm.

Eighteenth. Upon information and belief, that an agreement was entered into between the said co-partnership firm Beer, Sondheimer & Company and the said corporation Beer, Sondheimer & Co., Inc., under which the said corporation took over all of the assets and property of the said co-partnership firm and certain of the liabilities of said co-partnership firm.

[fol. 11] Nineteenth. That the purpose of the said co-partnership firm and also of the said Elkan and Frohnknecht in organizing the said corporation Beer, Sondheimer & Co., Inc., among other things was to evade the payment of the obligations of the said co-partnership firm to the said Mammoth Copper Mining Company of Maine.

Twentieth. Upon information and belief, that the said co-partnership firm and the members thereof, to wit, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, were on the 25th day of August, 1915, and still are the beneficial owners of assets and property in the United States, including those

transferred to the said Beer, Sondheimer & Co., Inc., and that the organization of the said corporation and the pretended transfer of such assets and property to it was a device to defeat and defraud the creditors of the said partnership firm and especially the Mammoth Copper Mining Company of Maine.

Twenty-first. Upon information and belief, that the beneficial ownership of the entire capital stock of the said corporation Beer, Sondheimer & Co., Inc., was on the 25th day of August, 1915, and at all times since that date vested in the said co-partnership firm and the members thereof, and that the legal title of the said stock and all of it at all of said times has been in certain persons acting as trustees for the said co-partnership firm Beer, Sondheimer & Company or the members thereof.

Twenty-second. Upon information and belief, that the said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and [fol. 12] Emil Beer, conspiring together and with said Elkan and said Frohknicht to defeat and defraud the said Mammoth Copper Mining Company of Maine and plaintiff, organized or caused to be organized the said corporation, transferred or caused to be transferred the said property and assets, and concealed their ownership in the said capital stock of Beer, Sondheimer & Co., Inc., for the purpose of deceiving, defeating and defrauding the creditors of the said co-partnership firm and especially the Mammoth Copper Mining Company of Maine and this plaintiff.

Twenty-third. That prior to the commencement of this action and on or about the 27th day of September, 1916, the said Mammoth Copper Mining Company of Maine for a valuable consideration duly assigned and transferred to the plaintiff herein by a certain instrument in writing all claims and causes of action which it had against the said co-partnership firm Beer, Sondheimer & Company and the members thereof arising under said contract of August 26, 1914, or otherwise.

Twenty-fourth. That on or about the 31st day of October, 1918, the plaintiff duly filed with the defendant A. Mitchell Palmer, as Alien Property Custodian, notice of plaintiff's said claim for said debt owing to plaintiff by said alien enemies, whose money and property in the United States has been conveyed, transferred, assigned and delivered or paid to the defendants, under oath, in the form and containing such particulars as the said defendant A. Mitchell Palmer, as Alien Property Custodian, required, as provided in Section 9 of the said Trading with the Enemy Act.

[fol. 13] Twenty-fifth. That plaintiff has made no application to the President of the United States to order the payment, conveyance, transfer, assignment or delivery of said money or property or of any portion thereof, and the President has made no such order.

Twenty-sixth. The war referred to in Section 9 of said Trading with the Enemy Act has not yet ended.

Twenty-seventh. That at all times hereinabove mentioned the said enemies and all of them were and now are in Germany and beyond the jurisdiction of the courts of the United States or of any of said courts and that no one has at any time been or now is designated, under statute of the State of New York or otherwise, as the representative or agent of them or of any of them, upon whom process could be served, and there is no property in this country belonging to them or any of them or in which they or any of them have any interest upon which an attachment can be levied, and plaintiff has been and is unable to effect service upon said co-partnership or any member of it or to attach property or assets belonging to them and he has no adequate remedy at law, and unless granted by this court the right to establish herein his said debt and the relief herein prayed for will suffer irreparable injury in that said enemies threaten to and will remove all their property from the United States and beyond the jurisdiction of the courts thereof.

Wherefore, plaintiff prays the court to issue such process as may [fol. 14] be necessary and require the said defendants to answer the complaint of the plaintiff, and after due hearing upon the issues of this action and the establishment of the debt claimed by plaintiff to order the delivery by the defendants to the plaintiff of so much of the said money and property of the said alien enemies hereinbefore mentioned as may be necessary to satisfy and discharge the said debt with interest thereon and the costs of this action, and for such other and further relief as the court may deem proper. And the plaintiff will ever pray, etc.

Charles W. Stockton, Solicitor for Plaintiff, 49 Broadway,
New York, N. Y.

Affidavit of F. Y. Robertson to above paper omitted in printing.

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

Ore Contract

This agreement made and entered into this 25th day of August, 1914, by and between the Mammoth Copper Mining Company of Kennett, California, a corporation existing under and by virtue of the laws of the State of Maine, party of the first part, and hereinafter designated as the "seller," and Beer, Sondheimer & Company of New York City, N. Y., party of the second part, and hereinafter designated as the "buyer,"

Witnesseth:

That, for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid by the parties hereto and the mutual terms and agreements herein contained, the seller agrees to sell and deliver and the buyer agrees to purchase and receive the product hereinafter specified upon the terms and conditions hereinafter set forth.

Product

The product covered by this contract is the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California.

The buyer is not obligated to accept any of the product running less than thirty-three (33%) per cent. metallic zinc. Should the seller produce a zinc product running less than thirty-three (33%) per cent. metallic zinc, the buyer reserves the option to purchase same under the terms of this contract. If the buyer should not [fol. 16] elect to accept such product, the seller has the privilege of disposing of it elsewhere.

Period

This contract shall run for a period of one year from the date of first shipment made after the completion of the picking plant which the seller contemplates building, but in no event shall the life of the contract exceed eighteen (18) months from the date of its execution.

Delivery

All of the product shall be delivered by the seller f. o. b. cars at the buyer's smelting works at Bartlesville, Oklahoma, or such other works as may be designated by the buyer. Provided that if there is any difference in freight between the shipping point and the smelting works so designated as against the freight rate between shipping point and Bartlesville, Oklahoma, the same shall be for the account of buyer. Shipments to be made in as near as possible equal weekly quantities.

Freight and Routing

The seller reserves the privilege of routing the shipments under this contract, so long as no extra cost is entailed thereby on the buyer.

Sampling

Sampling shall be done, free of charge, by the buyer. The seller to have the privilege of having a representative present at those operations. Smelter weights and samples to govern, except that if [fol. 17] the weights and sampling are not satisfactory to the seller, the question of weighing and sampling methods shall be decided by arbitration as hereinafter provided.

Assaying

Each of the parties hereto shall have assays made on the settlement samples. Should such assays agree within the splitting limits the average of same is to be taken for settlement.

The splitting limits shall be:

Gold .....	.02 oz.
Silver .....	.4 "
Lead .....	.5%
Zinc .....	.5%
Iron	1.0%
Copper .....	.3%
Silica	1.0%

or any greater amounts mutually agreed upon.

Should the assays fail to agree within the splitting limits, an umpire assay shall be made by the following chemists, each chemist to be taken in rotation:

Ledoux & Company, New York City.
 Pitkin & Company, New York City.
 J. W. Richards, Denver, Colo.
 Leonard & Root, Denver, Colo.
 Officer & Company, Salt Lake City, Utah.
 Union Assay Office, Salt Lake City, Utah.

Should the umpire's result fall between the two other results or [fol. 18] above the higher or below the lower by an amount not exceeding the splitting limit, then the average of the umpire's result and the one nearest to it shall be taken for settlement. Should the umpire's result fall outside either of the other two results by an amount exceeding the splitting limit, then the umpire assay shall be disregarded and the nearest assay to the umpire's assay taken as final settlement.

In every case, the party whose assay is farthest away from the umpire's assay, shall pay the umpire's charges.

Payments

\$19.00 per oz.

Gold: 70% of the gold contents to be paid for at —.

Silver: 60% of the contents to be paid for at the New York price for silver according to Engineering & Mining Journal on date of shipment.

Lead: 60% of the contents to be paid for as per dry assay (wet less 1.5 units) at 40c. per unit, if 5% dry or over. No pay if under 5% dry lead.

Copper: To be paid for as per wet assay less one unit, twenty pounds, at the E. & M. J. price for wire bar copper for the E. & M. J.'s week of the date of the bill-of-lading less 5c. per pound.

Iron: To be paid for at 10c. per unit.

Zinc: \$19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt.

For each unit of zinc in excess of 40%, a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

[fol. 19] For each cent raise in the price of spelter above \$5.00 per cwt., a credit of 5c. per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt. a debit of 5c. per ton will be made.

The price of spelter to govern shall be that quoted in the Engineering & Mining Journal, for the week of the date of the bill-of-landing.

Silica: To be charged for at 10c. per unit.

Treatment charge: \$3.25 per ton of ore or concentrates when payment for gold, silver, copper, lead and iron after deducting 10c. per unit for silica amounts to \$3.75 per ton or more. If payments for gold, silver, lead, and iron less the penalty for silica do not amount to \$3.75 per ton of ore or concentrates then no payment shall be made for gold, silver, copper lead and iron and no treatment charge or penalty on silica be assessed and only the zinc contents will be considered in the accounting.

Terms: Cash upon agreement of assays.

Delays from Strikes, etc.

Whenever the production or shipment of ore by the seller or the receipt or treatment of the ore by the buyer is prevented or delayed by acts of nature or the public enemy, strikes, riots, fires, floods, financial disturbances, contingencies of transportation, the order, judgment or decree of any court, or the act of any public officer, or any cause whatever beyond the control of the party in exercising good faith is so prevented or delayed, which may be properly termed [fol. 20] "Vis Major" or "Force Majeure," whether the same is included in the foregoing enumeration in express terms or otherwise, this agreement shall be suspended during such delay or prevention; the seller, if so prevented or delayed in producing or shipping the ore hereby contracted for, shall not be under any duty or obligation to furnish ore to the buyer, the production or shipment of which is so prevented or delayed, while the seller is so prevented or delayed, and the buyer if so prevented or delayed in receiving or treating the ore hereby contracted for, shall not be under any duty or obligation to receive any of the ore hereby contracted for, while so prevented or delayed. Upon the termination of the delay or interruption herein set forth, the obligation of the contracting parties shall be resumed.

Arbitration

If any differences arise between the parties hereto as to the interpretation and fulfillment of this contract, such questions shall be referred to a committee of arbitration, consisting of one arbitrator to be appointed by each party hereto. If said arbitrators are unable to agree, it shall be their privilege to choose an umpire and a decision of the majority shall be final. Every award or finding of such arbitrators shall be binding on both parties hereto. If either party fails to appoint an arbitrator within twenty (20) days after receipt of written notice requesting him to do so, it is hereby agreed that the decision shall be for the other party.

Notices

Any and all notices herein required to be given shall be deemed to be sufficiently served if the same be in writing and addressed to [fol. 21] the buyer at 61 Broadway, New York City, and to the seller at Newhouse Building, Salt Lake City, Utah.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written, binding their companies, partners, successors and assigns.

Executed in triplicate.

Mammoth Copper Mining Company (Subject to Approval),
By G. W. Metcalf, General Manager. Witness: Geo. W.
Henty. Beer, Sondheimer & Company, By Herbert Salinger,
Assistant Manager, Special Representative. Geo. W.
Henty. A. P. A.

[fol. 22] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

The complainant having filed his bill of complaint herein on November 26, 1918, and the defendants, A. Mitchell Palmer and John Burke having thereafter duly appeared herein by their solicitor, Francis G. Caffey, United States Attorney for the Southern District of New York,

Now come the defendants, A. Mitchell Palmer and John Burke by their solicitor and counsel and move the Court under Rule 29 of the Rules of Practice for the Courts of Equity of the United States that the bill of complaint herein be dismissed upon the ground of insufficiency of fact to constitute a valid cause of action in equity, it being manifest therefrom that the debt mentioned in the bill of complaint claimed to be owing to the complainant from the co-partnership Beer, Sondheimer & Company, consists of an unliquidated claim for damages by reason of breach of contract, [fol. 23] and is not a debt owing from an enemy within the meaning of Section 9 of the "Trading with the Enemy Act," approved October 6, 1917, as amended.

A. Mitchell Palmer, John Burke, By Francis G. Caffey,
United States Attorney for the Southern District of New
York, Solicitor. Earl B. Barnes, Assisand United States
Attorney, of Counsel.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS BILL OF COMPLAINT

SIR:

Please take notice that I shall bring on for hearing before Hon. John C. Knox, one of the Judges of this Court at his Chambers, [fol. 24] Room 1276 in the Woolworth Building, 233 Broadway, Borough of Manhattan, New York City, at 2 P. M., on the 20th of February, 1919, the motion to dismiss the bill of complaint herein heretofore served upon you on the 20th of January, 1919.

Dated, New York, February 13, 1919.

Yours, etc., Francis G. Caffey, United States Attorney for the Southern District of New York, Solicitor for Defendants, Office and P. O. Address U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fol. 25] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MEMORANDUM DECISION

I do not believe that the provisions of Section 9 of the Trading with the Enemy Act justifies the maintenance of the action here in question, in the absence of the Alien Enemy, for whose alleged default plaintiff has his cause of action. To permit an unliquidated claim to be litigated upon behalf of the enemy by the Custodian who in the very nature of things, cannot present an adequate defense, if one exists, does not comport with my idea of justice, nor do I think that such was the intention of Congress. In this conclusion I believe myself to be supported by *Watts & Union Austriaco di Navigazione*, United States Supreme Court, decided October 14, 1918, and the *Kaiser Wilhelm II*, 246 Fed., 786.

I shall, however, not dismiss the action, if within two weeks the plaintiff moves to amend by bringing in the alien enemy; whereupon if the amendment be made the action will be continued pending the possibility of service upon the alleged enemy, its appearance and ability to make defense.

Jno. C. Knox, U. S. D. J. March 11, 1919.

[fol. 26] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER DATED MARCH 18, 1919, ALLOWING THE FILING OF AMENDED
PETITION

Upon the original petition and all the proceedings had herein,
and on motion of Charles W. Stockton, Solicitor for the plaintiff,
it is

Ordered that the petition and all the papers in the proceedings
herein be and the same hereby are amended by adding as defendants
herein Nathan Sondheimer, Albert Sondheimer, Leo Wershner,
Ludwig Beer and Emil Beer, co-partners, doing business under the
firm name and style of Beer, Sondheimer & Company;

Further ordered that the plaintiff be and hereby is allowed to
file the annexed amended petition and that the said annexed amended
petition stands as the petition herein, and

[fol. 27] Further ordered that a supplemental subpoena issue
herein, directed to the parties who are added as defendants by virtue
of the provisions of this order to the end that they be brought in as
parties defendant in this action, and

Further ordered that all proceedings had herein stand with the
same force and effect as if this action had been originally against
the defendants as constituted by the amendment.

Dated, New York, March 18, 1919.

John C. Knox, U. S. D. J.

[fol. 28] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

In Equity. E. 15-320

FREDERICK Y. ROBERTSON, Plaintiff,
against

A. MITCHELL PALMER, as Alien Property Custodian; JOHN BURKE,
as Treasurer of the United States of America, and Nathan Sond-
heimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and
Emil Beer, Copartners, Doing Business under the Firm Name
and Style of Beer, Sondheimer & Company, Defendants.

AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United
States for the Southern District of New York:

Frederick Y. Robertson, a citizen of the State of New York, re-
siding in the Southern District thereof, brings this suit against

A. Mitchell Palmer, a citizen and resident of the State of Pennsylvania, as Alien Property Custodian, duly qualified and acting under the Federal Statute, approved October 6, 1917, and known as "Trading with the Enemy Act"; against John Burke, a citizen and resident of State of North Dakota, as Treasurer of the United States of America; Nathan Sondheimer, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Albert Sondheimer, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Leo Wershner, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Ludwig Beer, a citizen of Germany, residing at Frankfort-on-the-Main in said country, and Emil Beer, a citizen of Germany, residing at Frankfort-on-the-Main in said country, and for his amended petition alleges:

First. That this suit is between citizens of different States and the sum or amount in controversy largely exceeds the sum or value of three thousand dollars, exclusive of costs and interest.

Second. That this suit arises under the Laws of the United States and this Court has jurisdiction hereof under said laws, and especially under an Act of Congress, approved October 6, 1917, and known as the "Trading with the Enemy Act."

Third. That the plaintiff is a citizen and a resident of the State of New York, and is not and has not at any time herein mentioned been an enemy or an ally of an enemy, within the meaning of the said Act of Congress.

Fourth. That the Mammoth Copper Mining Company of Maine is and at all times hereinafter mentioned was a corporation, organized and existing under and by virtue of the laws of the State of Maine, and neither said corporation nor any of its stockholders is or at any [fol. 30] time has been an enemy or ally of an enemy as defined in said Act.

Fifth. Upon information and belief, that Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, are and at all times hereinafter mentioned were citizens of Germany, residents of Frankfort-on-the-Main, Germany, alien enemies of the United States, as defined by the said Act, and co-partners, doing business under the name and style of Beer, Sondheimer & Company, and that the home office of the said firm is and at all such times was at Frankfort-on-the-Main, Germany.

Sixth. That A. Mitchell Palmer is and at all times since on and before the first day of January, 1918, was the Alien Property Custodian, duly appointed, qualified and acting under and pursuant to the provisions of said "Trading with the Enemy Act," and as such and on or about the 22nd day of July, 1918, seized and now has in his custody and possession or under his control the money and property in the United States due or belonging to said alien enemies or of which said alien enemies are the owners, or in which they have a substantial interest, and he now has and retains possession and custody thereof.

Seventh. Upon information and belief, that John Burke is and at all times hereinafter mentioned was the Treasurer of the United States of America, duly appointed, qualified and acting as such, and that as such Treasurer and under and pursuant to certain provisions of said Act known as the "Trading with the Enemy Act," he has received and now has in his possession or custody certain moneys, constituting part of the property of the alien enemies herein mentioned.

Eighth. That the said co-partnership firm of Beer, Sondheimer & Company on and for a long time previous to the 29th day of September, 1914, and for approximately one year thereafter, was engaged in business in the State of New York and elsewhere in the United States of America, under the firm name of Beer, Sondheimer & Company, and that at all such times its business in New York City was conducted by or through certain managers or agents, to wit, Benno Elkan and Otto Frohnknecht.

Ninth. That on or about the 29th day of September, 1914, the Mammoth Copper Mining Company of Maine, and said co-partnership firm of Beer, Sondheimer & Company, duly entered into a certain contract in writing, subscribed by the said Mammoth Copper Mining Company of Maine, and by said Beer, Sondheimer & Company as of date August 26, 1914, a copy of which said contract is annexed hereto, marked Exhibit "B," and made a part hereof.

Tenth. That by the terms of said contract the Mammoth Copper Mining Company of Maine contracted to sell and deliver to the said Beer, Sondheimer & Company, at the smelting works of the said firm at Bartlesville, in the State of Oklahoma, or at such other works as the said Beer, Sondheimer & Company might designate, and the said Beer, Sondheimer & Company contracted to purchase and receive from the said Mammoth Copper Mining Company of Maine, [fol. 32] all of the zinc crude ore running not less than thirty-three per cent. metallic zinc which the Mammoth Copper Mining Company of Maine produced at and shipped from its said mine and property, between the said 29th day of September, 1914, and a date being one year after the date of the first shipment made after the completion of the picking plant which the Mammoth Copper Mining Company of Maine contemplated building. That the said picking plant was completed and the first shipment thereafter made on February 26, 1915.

Eleventh. Upon information and belief, that between the said 29th day of September, 1914, and the 26th day of February, 1916, the Mammoth Copper Mining Company of Maine produced and shipped from its said mine and property ten thousand nine hundred seventy-four and three hundred thirteen thousandths (10,974.313) tons of said zinc crude ore, none of which ran less than thirty-three per cent. metallic zinc; and that the said co-partnership firm of Beer, Sondheimer & Company accepted and received from the Mammoth Copper Mining Company of Maine one thousand four hundred forty-eight and three hundred eighty-two thousandths

(1,448,382) tons of said zinc crude ore and paid therefor at the prices stated in said contract the sum of Thirty thousand nine hundred ninety-seven and eighty-one hundredths (\$30,997.81) Dollars.

Twelfth. Upon information and belief, that the said Mammoth Copper Mining Company of Maine duly offered to deliver the remaining nine thousand five hundred twenty-five and nine hundred thirty-[fol. 33] one thousandths (9,525.931) tons of said zinc crude ore to the said Beer, Sondheimer & Company at its said smelting works at Bartlesville, Oklahoma, or any other works that the said firm might designate, but that the said Beer, Sondheimer & Company refused to receive the said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore or any part thereof, and refused to pay for the same or any part of it, or to perform its said agreement in any respect further than performed as hereinbefore alleged, although the Mammoth Copper Mining Company of Maine duly tendered said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore to said Beer, Sondheimer & Company, and has duly requested said Beer, Sondheimer & Company to accept the same and pay therefor, and has otherwise in all respects complied with and performed, or tendered performance of the provisions of the said contract by it to be performed.

Thirteenth. That after the said Beer, Sondheimer & Company had refused to accept the said ore as hereinabove alleged, the Mammoth Copper Mining Company of Maine sold the said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore for the best obtainable prices and at the then market value, to wit: for the sum of Two hundred thirty-eight thousand two hundred seventy-eight and seventy-six hundredths (\$238,278.76) Dollars.

Fourteenth. That the amount which was due to be paid to the [fol. 34] Mammoth Copper Mining Company of Maine by said Beer, Sondheimer & Company for said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore at the prices stipulated in said contract is the sum of Five hundred eleven thousand one hundred three and sixty-four hundredths (\$511,103.64) Dollars.

Fifteenth. That the difference between said amount and the amount realized by the Mammoth Copper Mining Company of Maine in the sale of nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore on the market is Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight hundredths (\$272,828.88) Dollars.

Sixteenth. That by reason of the premises and of the assignment hereinafter referred to by this plaintiff, said alien enemies became and are indebted, jointly and severally, to the plaintiff in the sum of Two hundred seventy-two thousand eight hundred twenty-four

and eighty-eight hundredths (\$272,824.88) Dollars, with interest from the dates payment became due under said contract to September 4, 1916, amounting to Sixteen thousand three hundred forty-two and fifty-four hundredths (\$16,342.54) Dollars, no part of which has been paid, although duly demanded.

Seventeenth. That on or about the 25th day of August, 1915, a corporation under the name of Beer, Sondheimer & Co., Inc., was organized under the laws of the State of New York, which took over and thereafter conducted all the business in the United States [fol. 35] of the said co-partnership firm or a very large part thereof, and that the said Benno Elkan and Otto Frohnknecht, who had theretofore conducted and managed the business of the said co-partnership firm of Beer, Sondheimer & Company, became respectively the President and Vice-President of the said domestic corporation Beer, Sondheimer & Co., Inc., and continued the operations and business theretofore conducted by and for the said co-partnership firm in the same offices at 61 Broadway, New York, as theretofore occupied by the said co-partnership firm.

Eighteenth. Upon information and belief, that an agreement was entered into between the said co-partnership firm Beer, Sondheimer & Company and the said corporation Beer, Sondheimer & Co., Inc., under which the said corporation took over all of the assets and property of the said co-partnership firm and certain of the liabilities of said co-partnership firm.

Nineteenth. That the purpose of said co-partnership firm and also of the said Elkan and Frohnknecht in organizing the said corporation Beer, Sondheimer & Co., Inc., among other things was to evade the payment of the obligations of the said co-partnership firm to the said Mammoth Copper Mining Company of Maine.

Twentieth. Upon information and belief, that the said co-partnership firm and the members thereof, to wit: Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, were, on the 25th day of August, 1915, and still are the beneficial owners of assets and property in the United States, including those [fol. 36] transferred to the said Beer, Sondheimer & Co., Inc., and that the organization of the said corporation and the pretended transfer of such assets and property to it was a device to defeat and defraud the creditors of the said partnership firm and especially the Mammoth Copper Mining Company of Maine.

Twenty-first. Upon information and belief, that the beneficial ownership of the entire capital stock of the said corporation Beer, Sondheimer & Co., Inc., was on the 25th day of August, 1915, and at all times since that date vested in said co-partnership firm and the members thereof, and that the legal title of the said stock and all of it at all of said times has been in certain persons acting as trustees for the said co-partnership firm Beer, Sondheimer & Company or the members thereof.

Twenty-second. Upon information and belief, that the said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, conspiring together and with said Elkan and said Frohnknecht to defeat and defraud the said Mammoth Copper Mining Company of Maine, and plaintiff organized or caused to be organized the said corporation, transferred or caused to be transferred the said property and assets, and concealed their ownership in the said capital stock of Beer, Sondheimer & Co., Inc., for the purpose of deceiving, defeating and defrauding the creditors of the said co-partnership firm and especially the Mammoth Copper Mining Company of Maine and this plaintiff.

Twenty-third. That prior to the commencement of this action, [fol. 37] and on or about the 27th day of September, 1916, the said Mammoth Copper Mining Company of Maine, for a valuable consideration, duly assigned and transferred to the plaintiff herein by a certain instrument in writing all claims and causes of action which it had against the said co-partnership firm Beer, Sondheimer & Company and the members thereof, arising under said contract of August 26, 1914, or otherwise.

Twenty-fourth. That on or about the 31st day of October, 1918, the plaintiff duly filed with the defendant, A. Mitchell Palmer, as Alien Property Custodian, notice of plaintiff's said claim for said debt owing to plaintiff by said alien enemies, whose money and property in the United States has been conveyed, transferred, assigned and delivered or paid to the defendants, under oath, in the form and containing such particulars as the said defendant A. Mitchell Palmer, as Alien Property Custodian, required, as provided in Section 9 of the said Trading with the Enemy Act.

Twenty-fifth. That plaintiff has made no application to the President of the United States to order the payment, conveyance, transfer, assignment or delivery of said money or property or of any portion thereof, and the President has made no such order.

Twenty-sixth. The war referred to in Section 9 of said Trading with the Enemy Act has not yet ended.

Twenty-seventh. That at all times hereinabove mentioned, the said enemies and all of them were and now are in Germany and beyond the jurisdiction of the courts of the United States or of any of said courts, and that no one has at any time been or now is designated, under statute of the State of New York or otherwise, as the representative or agent of them or of any of them, upon whom process could be served, and there is no property in this country belonging to them or any of them or in which they or any of them have any interest upon which an attachment can be levied, and plaintiff has been and is unable to effect service upon said co-partnership or any member of it, or to attach property or assets belonging to them, and he has no adequate remedy at law, and unless granted by this court the right to establish herein his said debt and the relief herein prayed for, will suffer irreparable injury in that said enemies

threaten to and will remove all their property from the United States and beyond the jurisdiction of the courts thereof.

Wherefore, plaintiff prays the court to issue such process as may be necessary and require the said defendants to answer the complaint of the plaintiff, and after due hearing upon the issues of this action and the establishment of the debt claimed by plaintiff against the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner and Ludwig Beer, and to order the delivery by the defendants, A. Mitchell Palmer, as Alien Property Custodian and John Burke as Treasurer of the United States of America, to the plaintiff of so much of the said money and property of the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, and Ludwig Beer, as may be necessary to satisfy and discharge the said debt with interest [fol. 39] thereon and the costs of this action, and for such other and further relief as the court may deem proper. And the plaintiff will ever pray, &c.

Charles W. Stockton, Solicitor for Plaintiff, 49 Broadway,
New York, N. Y.

Affidavit of F. Y. Robertson to above paper omitted in printing.

[fol. 40]

EXHIBIT "B" TO AMENDED BILL

Ore Contract

This agreement made and entered into this 26th day of August, 1914, by and between the Mammoth Copper Mining Company of Kennett, California, a corporation existing under and by virtue of the laws of the State of Maine, party of the first part, and herein designated as the "Seller," and Beer, Sondheimer & Company, of New York City, N. Y., party of the second part, and hereinafter designated as the "Buyer,"

Witnesseth:

That for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid by the parties hereto, and the mutual terms and agreements herein contained, the seller agrees to sell and deliver and the buyer agrees to purchase and receive the product hereinafter specified upon the terms and conditions hereinafter set forth.

Product

~ The product covered by this contract is the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California.

The buyer is not obligated to accept any of the product running less than thirty-three (33%) per cent metallic zinc. Should the seller produce a zinc product running less than thirty-three (33%) per cent metallic zinc, the buyer reserved the option to purchase same

[fol. 41] under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere.

Period

This contract shall run for a period of one year from the date of first shipment made after the completion of the picking plant which the seller contemplates building, but in no event shall the life of the contract exceed eighteen (18) months from the date of its execution.

Delivery

All of the product shall be delivered by the seller f. o. b. cars at the buyer's smelting works at Bartlesville, Oklahoma, or such other works as may be designated by the buyer. Provided that if there is any difference in freight between the shipping point and the smelting works so designated as against the freight rate between shipping point and Bartlesville, Oklahoma, the same shall be for the account of buyer. Shipments to be made in as near as possible equal weekly quantities.

Freight and Routing

The seller reserves the privileges of routing the shipments under this contract, as long as no extra cost is entailed thereby on the buyer.

Sampling

Sampling shall be done, free of charge, by the buyer. The seller [fol. 42] to have the privilege of having a representative present at those operations. Smelter weights and samples to govern, except that if the weights and sampling are not satisfactory to the seller, the question of weighing and sampling methods shall be decided by arbitration as hereinafter provided.

Assaying

Each of the parties hereto shall have assays made on the settlement samples. Should such assays agree within the splitting limits the average of same is to be taken for settlement. The splitting limits shall be:

Gold .....	.02 oz.
Silver .....	.4
Lead .....	.5%
Zinc .....	.5%
Iron	1.0%
Copper .....	.3%
Silica	1.0%

or any greater amounts mutually agreed upon.

Should the umpire's result fall between the two other results or above the higher or below the lower by an amount not exceeding the splitting limit, then the average of the umpire's result and the one nearest to it shall be taken for settlement. Should the umpire's result fall outside either of the other two results by an amount exceeding the splitting limit, then the umpire assay shall be disregarded and the nearest assay to the umpire's assay taken as final settlement. [fol. 43] In every case, the party whose assay is farthest away from the umpire's assay, shall pay the umpire's charges.

Payments

Gold: 70% of the gold contents to be paid for at \$19.00 per oz.

Silver: 60% of the contents to be paid for at the New York price for silver according to Engineering & Mining Journal on date of shipment.

Lead: 60% of the contents to be paid for as per dry assay (wet less 1.5 units) at 40¢ per unit, if 5% dry or over. No pay if under 5% dry lead.

Copper: To be paid for as per wet assay less one unit, twenty pounds, at the E. & M. J. Price for wire bar copper for the E. & M. J.'s week of the date of the bill of lading less 5% per pound.

Iron: To be paid for at 10¢ per unit.

Zinc: \$19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt. For each unit of zinc excess of 40%, a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

For each cent raise in the price of spelter above \$5.00 per cwt. a credit of 5¢ per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt. a debit of 5¢ per ton will be made. The price of spelter to govern [fol. 44] shall be that quoted in the Engineering & Mining Journal for the week of the date of the bill of lading.

Silica: To be charged for at 10¢ per unit.

Treatment Charge: \$3.25 per ton of ore or concentrates when payment for gold, silver, copper, lead and iron after deducting 10¢ per unit for silica amounts to \$3.75 per ton or more. If payments for gold, silver, lead and iron, less the penalty for silica do not amount to \$3.75 per ton of ore or concentrates, then no payment shall be made for gold, silver, lead and iron and no treatment charge or penalty on silica be assessed, and only the zinc contents will be considered in the accounting.

Terms: Cash upon agreement of assays:

Delays from Strikes, etc.

Whenever the production or shipment of ore by the seller or the receipt or treatment of the ore by the buyer is prevented or delayed by acts of nature or the public enemy, strikes, riots, fires, floods, financial disturbances, contingencies of transportation, the order, judgment or decree of any court, or the act of any public officer, or

any cause whatever beyond the control of the party in exercising good faith is so prevented or delayed, which may be properly termed "Vis Major" or "Force Majeure," whether the same is included in the foregoing enumeration in express terms or otherwise, this agreement shall be suspended during such delay or prevention; the seller, if so prevented or delayed in producing or shipping the ore hereby contracted for, shall not be under any duty or obligation to furnish [fol. 45] ore to the buyer, the production or shipment of which is so prevented or delayed, while the seller is so prevented or delayed, and the buyer if so prevented or delayed in receiving or treating the ore hereby contracted for, shall not be under any duty or obligation to receive any of the ore hereby contracted for, while so prevented or delayed. Upon the termination of the delay or interruption herein set forth, the obligation of the contracting parties shall be resumed.

Arbitration

If any differences arise between the parties hereto as to the interpretation and fulfillment of this contract, such questions shall be referred to a committee of arbitration, consisting of one arbitrator to be appointed by each party hereto. If said arbitrators are unable to agree, it shall be their privilege to choose an umpire and a decision of the majority shall be final. Every award or finding of such arbitrators shall be binding on both parties hereto. If either party fails to appoint an arbitrator within twenty (20) days after receipt of written notice requesting him to do so, it is hereby agreed that the decision shall be for the other party.

Notices

Any and all notices herein required to be given shall be deemed to be sufficiently served if the same be in writing and addressed to the buyer at 61 Broadway, New York City, and to the seller at Newhouse Building, Salt Lake City, Utah.

[fol. 46] In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written, binding their companies, partners, successors and assigns.

Executed in triplicate.

Mammoth Copper Mining Company (Subject to Approval),
By G. W. Metcalfe, General Manager. Witness: Geo. W.
Henty. Beer, Sondheimer & Company, By Herbert Salinger,
Assistant Manager, Special Representative. Geo. W.
Henty.

[fol. 47] AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK HELD IN THE UNITED STATES COURTS AND POST OFFICE BUILDING, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 27TH DAY OF MARCH, 1919

Present: Hon. John C. Knox, United States District Judge.

[Title omitted]

ORDER DENYING MOTION TO DISMISS BILL OF COMPLAINT AND NOTICE OF ENTRY

After hearing Francis G. Caffey, Esq., United States Attorney for the Southern District of New York, solicitor for the defendants A. [fol. 48] Mitchell Palmer, as Alien Property Custodian, and John Burke, as Treasurer of the United States, in support of the motion to dismiss the bill of complaint herein, and after hearing Charles W. Stockton, Esq., solicitor for the plaintiff, in opposition thereto, and due deliberation having been had thereon,

Now, on the memorandum handed down by Hon. John C. Knox, one of the judges of this Court, dated March 11, 1919, on said motion and on the order of Hon. John C. Knox, dated March 18, 1919, amending the complaint by adding thereto the alien enemy defendants, and on the duly amended complaint verified March 18, 1919, and on all papers and proceedings heretofore had herein, it is

Ordered that the motion to dismiss the complaint be and it hereby is denied, and it is

Further ordered by the Court upon its own motion that this action be and it hereby is continued pending service upon the alien enemy defendants in such manner and form as this Court may approve and order.

John C. Knox, U. S. D. J.

[fol. 49] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER OF SUBSTITUTION

Upon reading and filing the annexed consent and upon motion of Francis G. Caffey, United States Attorney for the Southern District of New York, Proctor for A. Mitchell Palmer, as Alien Property Custodian, it is

Ordered that Francis P. Garvan, as Alien Property Custodian, be substituted as a defendant herein in place and stead of the defendant A. Mitchell Palmer sued as Alien Property Custodian.

Dated, New York, April 8, 1919.

Augustus N. Hand, United States District Judge.

Entry of the foregoing order is hereby consented to without further notice.

Dated, New York, April —, 1919.

Charles W. Stockton, Solicitor for Plaintiff.

[fol. 50] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTION FOR SUPPLEMENTAL SUBPENA

SIR:

Please take notice that upon the annexed affidavit of Charles W. Stockton, duly verified the 28th day of March, 1919, I shall move this Court at a stated term thereof, held in the Post Office Building, Borough of Manhattan, City of New York, on April 4th, 1919, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order that the transmission of the supplemental sub-[fol. 51] pœna issued herein directed to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company, by the State Department of the United States of America, through diplomatic channels be deemed due and sufficient service of such subpoena, and that the certificate of a duly appointed diplomatic representative of the United States that service has been so effected shall be sufficient proof thereof.

Charles W. Stockton, Solicitor for Plaintiff, Post Office Address 51 Broadway, Borough of Manhattan, City of New York.

To Francis G. Caffey, United States Attorney, Solicitor for Defendants, A. Mitchell Palmer & John Burke.

[fol. 52] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES W. STOCKTON READ ON MOTION FOR SUPPLEMENTAL SUBPENA

STATE OF NEW YORK,
County of New York, ss:

Charles W. Stockton, being duly sworn, deposes and says:

He is the solicitor for the plaintiff herein; on information and belief that;

For many years prior to the 1st day of August, 1914, and the outbreak of the European War, there was in existence a copartnership [fol. 53] called Beer, Sondheimer & Co., consisting of Leo Wershner, Nathan M. T. Sondheimer, Albert Sondheimer, Ludwig Beer and Emil Beer, as members thereof, and engaged in the business of buying, selling and otherwise dealing in metals.

The principal place of business of said copartnership has at all times been and now is in the City of Frankfort on Main in the Empire of Germany, and all the members of said copartnership were at all times and now are citizens of Germany, and resided, and now reside in Germany.

In or about the year 1903 said copartnership established a branch of its business in the United States and opened an office for the transaction of the business of said branch in the City of New York under the name of Agency of Beer, Sondheimer & Co.

The business of said branch continued to be conducted under the name of Agency of Beer, Sondheimer & Co. until the year 1912, when the name was changed to Beer, Sondheimer & Co., American Branch, under which name said business in the United States continued to be conducted until the month of August, 1915.

Said business of Beer, Sondheimer & Co. in the United States, under whatever name transacted, has at all times been conducted by Benno Elkan and one Otto Frohnknecht, as agents and representatives of said copartnership Beer, Sondheimer & Co., and neither said Benno Elkan nor said Otto Frohnknecht, was at any time a member of said copartnership Beer, Sondheimer & Co., either in the business of said copartnership in Germany or in the United States.

[fol. 54] The sources of deponent's information and grounds of his belief are the allegations set forth in the answer of Francis G. Caffey, U. S. District Attorney for the Southern District of New York to the petition of Benno Elkan filed in this Court on November 25, 1918. The said answer of Francis G. Caffey was duly verified by Earl B. Barnes, Asst. U. S. Attorney for the Southern District of New York, who alleges that the grounds of his belief as to the matters stated in such manner are investigations made by him, communications received by him from the Alien Property Custodian and originals and copies of documents and letters in his possession.

On or before August 26, 1914, said Benno Elkan duly acting within the scope of his authority as the American Agent for said Beer, Sondheimer & Co. authorized Herbert Salinger, Assistant Manager and Special Representative of said Beer, Sondheimer & Co., to enter into an agreement with the Mammoth Copper Mining Co., a Maine Corporation, plaintiff's assignor, on behalf of said Beer, Sondheimer & Co. for the purchase of the total production of zinc crude ore shipped by the said Mammoth Copper Mining Company from its properties in Shasta County, California, within a period ending one year from the date of the first shipment made after the completion of the Picking Plant which the said Mammoth Copper Mining Company contemplated building. A copy of said contract is annexed to the plaintiff's verified amended petition and plaintiff begs leave to refer thereto as if the same were set forth herein in full.

The said H. Salinger duly executed such contract at Salt Lake [fol. 55] City, Utah, with the plaintiff's assignor in behalf of the said Beer, Sondheimer & Company on August 26, 1914.

The said Picking Plant was thereafter completed and the first shipment made therefrom on February 26, 1915. Between September 29th, 1914, and February 26th, 1916, the Mammoth Copper Mining Company of Maine produced and shipped from its said properties in Shasta County, California, 10,974.313 tons of said zinc crude ore none of which ran less than 33% metallic zinc; that 1,418,382 tons of said zinc crude ore were delivered by the said Mammoth Copper Mining Company of Maine to the defendants, Beer, Sondheimer & Company, and were accepted, received and paid for by the defendants, Beer, Sondheimer & Company. The Mammoth Copper Mining Company of Maine duly offered to deliver the remaining 9,525.931 tons of said zinc crude ore to the said Beer, Sondheimer & Company in accordance with the contract heretofore referred to, but the said Beer, Sondheimer & Company refused to receive and accept the said 9,525.931 tons of such zinc crude ore, or any part thereof, and refused to pay for the same or any part thereof, or to further perform its said agreement in any respect.

Said Benno Elkan is within the territory of the United States and has submitted himself to the jurisdiction of this Court by filing a petition in this Court against A. Mitchell Palmer as Alien Property Custodian, which action is now pending.

Said Otto Frohnknecht is within the territory of the United States and has submitted himself to the jurisdiction of this Court by filing a petition in this Court against A. Mitchell Palmer as Alien Property Custodian, which action is now pending.

[fol. 56] Said Beer, Sondheimer & Co. consisting of Leo Wershner, Nathan Sondheimer, Albert Sondheimer, Ludwig Beer and Emil Beer, as members thereof, are alien enemies within the meaning of the "Trading with the Enemy Act" and that the Alien Property Custodian has seized all their properties within the United States under the authority conferred upon him by such Act.

All the facts pertaining to the execution, part performance, and breach of said contract are in the possession of said Benno Elkan and Otto Frohnknecht as managers of the American branch of said Beer, Sondheimer & Co., and therefore any evidence that may be relevant to the defence of this action is now available within the United States: on information and belief that the said Nathan Sondheimer, Leo Wershner, Albert Sondheimer, Ludwig Beer and Emil Beer are not in possession of any evidence which would be relevant as a defence herein and they had no personal connection with the transaction. This action can be tried at once without any injustice to the defendants, Leo Wershner, Nathan Sondheimer, Albert Sondheimer, Ludwig Beer and Emil Beer because of their inability to be present in person.

Wherefore defendant prays that an order be made directing that the transmission of the supplemental subpoena directed to Leo Wershner, Nathan Sondheimer, Albert Sondheimer, Ludwig Beer

and Emil Beer by the State Department of the United States of America through diplomatic channels be deemed due and sufficient service, and that the certificate of a duly appointed diplomatic representative of the United States that service has been so effected shall be sufficient proof thereof. No previous application has been made to any court or judge for such order.

Charles W. Stockton.

Sworn to before me this 28th day of March, 1919. Edward R. Whittingham, Notary Public, New York County. New York County Clerk's No. 316. New York Co. Register's No. 1173. Term expires March 30, 1920.

[fol. 58] AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES HELD IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE POST OFFICE BUILDING, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 10TH DAY OF APRIL, 1919

Present: Honorable Augustus N. Hand, District Judge.

[Title Omitted]

ORDER FOR TRANSMISSION OF SUPPLEMENTAL SUBPÆNA AND NOTICE OF ENTRY

Upon reading and filing the notice of motion herein and annexed [fol. 59] affidavit of Charles W. Stockton verified the 28th day of March, 1919, and it appearing that Francis G. Caffey, solicitor for defendants A. Mitchell Palmer and John Burke, does not oppose the making of an order for substituted service upon the non-resident alien defendants, and submits any question as to the details of such service to the discretion of this Court, and due deliberation having been had, now on motion of Charles W. Stockton, solicitor for the plaintiff, it is

Ordered that the transmission of the supplemental subpœna issued herein directed to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company, by the State Department of the United States of America to such defendants through diplomatic channels, be deemed due and sufficient service of such subpœna, and

Further ordered that the certificate of a diplomatic representative of the United States that service has been so effected shall be sufficient proof thereof.

Augustus N. Hand, D. J.

[fol. 60] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTION FOR ORDER FOR TRANSMISSION OF SUPPLEMENTAL
SUBPŒNA

Please take notice that on the annexed affidavit of Charles W. Stockton, duly verified August 20th, 1919, and upon the order of the Honorable John C. Knox, D. J., entered herein the fourth day of April, 1919, and upon the affidavit of Charles W. Stockton, duly verified the 28th day of March, 1919, upon which said order was made, and on all the pleadings and proceedings herein, the undersigned will move this Court at a Special Term thereof to be held at the District Court House Thursday, August 21, 1919, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order in the form hereto annexed directing that service of the supplemental subpœna herein be made upon defendants Nathan Sondheimer, Albert Son-heimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style [fol. 61] of Beer, Sondheimer & Co., by mailing and publishing said supplemental subpœna as therein prescribed.

Dated, New York, August 20th, 1919.

Yours, etc., Charles W. Stockton, Solicitor for Plaintiff, Office
& P. O. Address 51 Broadway, Borough of Manhattan, City
of New York, N. Y.

To Hon. Francis G. Caffey, United States District Attorney,
Solicitor for Defendants, Garvan, etc.

[fol. 62] AT A STATED TERM OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK HELD IN THE UNITED STATES COURTS AND POST
OFFICE BUILDING, BOROUGH OF MANHATTAN, CITY OF
NEW YORK, ON THE 21ST DAY OF AUGUST, 1919

[Title omitted]

ORDER FOR TRANSMISSION OF SUPPLEMENTAL SUBPŒNA

On reading and filing the annexed affidavit of Charles W. Stockton duly verified the 20th day of August, 1919, and on the proceedings heretofore had herein and after hearing Charles W. Stockton, Esq., [fol. 63] solicitor for the plaintiff, and Hon. Francis G. Caffey, United States District Attorney, for defendants Garvan and Burke.

Now, on motion of Charles W. Stockton, solicitor for the plaintiff,
it is

Ordered, that service of the supplemental subpoena in the above entitled action upon the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, be made by publication thereof in two newspapers, viz.: in the New York Evening Post published in New York, N. Y., and in the New York Law Journal, published in the Borough of Manhattan, Southern District of New York, once a week for six successive weeks; and it is further

Ordered, that on or before the date of the first publication, said plaintiff shall deposit in the general post office in the Borough of Manhattan, City and County of New York, copies of the supplemental sub subpoena hereto annexed and of this order, each contained in a securely closed post paid wrapper directed to the following defendants respectively:

Nathan Sondheimer, Frankfort-on-the-Main, Germany;

Albert Sondheimer, Frankfort-on-the-Main, Germany;

Leo Wershner, Frankfort-on-the-Main, Germany;

Ludwig Beer, Frankfort-on-the-Main, Germany;

Emil Beer, Frankfort-on-the-Main, Germany.

Enter.

Julian W. Mack, U. S. D. J.

[fol. 64] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES W. STOCKTON READ ON MOTION FOR TRANS-
MISSION OF SUPPLEMENTAL SUBPŒNA

STATE OF NEW YORK,
County of New York, ss:

Charles W. Stockton, being duly sworn, deposes and says that he is the solicitor for the plaintiff herein.

That this is an action for breach of the defendants' contract to pay [fol. 65] for certain ore sold and delivered to the defendants by the Mammoth Copper Mining Company of Maine, plaintiff's assignor, as set forth more fully in the amended petition herein; on information and belief that defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are not residents of the United States but are residents of Germany, residing at Frankfort-on-the-Main in said country; that the sources of deponent's information that said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are not residents of the United States but are residents of Germany as before stated, are that on or about September 29, 1916, he sent letters addressed to each of said defendants at Frankfort-on-the-Main, Germany, by registered mail, and on or about December 9, 1916, he duly received the return receipts for the same, showing that they had been received at Frankfort by said defendants on or about November 3, 1916; that the Alien

Property Custodian appointed under the Act of Congress known as the "Trading with the Enemy Act" has seized property aggregating upwards of One Million Dollars (\$1,000,000), belonging to said defendants, as alien enemies, residing at Frankfort-on-the-Main, Germany, and that no dispute whatever has been made by said defendants of his right so to do; on information and belief that on or about the 22nd day of December, 1916, at San Francisco, one Royall Vietor, a member of the firm of Messrs. Sullivan & Cromwell of New York City, who at that time were attorneys for said defendants, stated to Alfred Sutro that all of said defendants resided at Frankfort-on-the-Main, Germany; that the sources of deponent's information [fol. 66] are letters and conversations with said Alfred Sutro, also the affidavit of Ernest G. Hothorn made in the action of Frederick Y. Robertson against Beer & Company, Inc., et al., in the Supreme Court in the County of New York, duly verified the second day of October, 1916, whereby it appears that said Hothorn has had business dealings with said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, and has met them at their homes at Frankfort-on-the-Main and knows of his own knowledge that said defendants are none of them residents of the United States but are residents of Frankfort as stated. Wherefore plaintiff has been unable and will be unable with due diligence to make personal service on said defendants.

That on April 10, 1919, an order was made herein by the Hon. August N. Hand, United States District Judge, in which it was directed that the transmission of the supplemental subpoena issued herein directed to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company, by the State Department of the United States of America to said defendants through diplomatic channels, be deemed due and sufficient service of such subpoena; that said subpoena was duly forwarded to the State Department and that on inquiry by deponent, on or about August 9, 1919, he was informed by the State Department that the said Department was endeavoring to ascertain if the subpoena had been duly forwarded; that at the same time deponent was informed by the State Department that communication with Germany by [fol. 67] mail is now open and it was suggested to deponent that direct communication with defendants by the usual methods be now undertaken. Deponent begs leave to refer to statements made in the affidavit of deponent, verified on or about March 28, 1919, and filed herein, which was the basis for the order above referred to.

Wherefore deponent prays for an order in the form annexed hereto directing that service of the supplemental subpoena herein be made upon defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company, by publication and mailing as prescribed therein.

Chas. W. Stockton.

Sworn to before me this 20th day of August, 1919. E. R. Whittingham, Notary Public, New York County. New York County Clerk's No. 316. New York Co. Register's No. 1173. Term expires March 30, 1920.

[fol. 68] AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK HELD IN THE UNITED STATES COURTS AND POST OFFICE BUILDING, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 8TH DAY OF SEPTEMBER, 1919

[Title omitted]

Present: Hon. Julian W. Mack, United States District Judge.

ORDER FOR PUBLICATION OF SUPPLEMENTAL SUBPÆNA

On the affidavit of Charles W. Stockton hereto annexed, duly verified the 8th day of September, 1919, and on the order for sub-[fol. 69] stituted service by publication of the supplemental subpœna, entered on the 21st day of August, 1919, and on all papers and proceedings herein; it is

Ordered that an alias supplemental subpœna be issued herein directed to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company, to be published and mailed pursuant to the above order of August 21, 1919.

Enter.

J. W. Mack.

[fol. 70] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES W. STOCKTON READ ON APPLICATION FOR ALIAS SUPPLEMENTAL SUBPÆNA

STATE OF NEW YORK,
County of New York, ss:

Charles W. Stockton, being duly sworn, deposes and says:

That he is the solicitor for the plaintiff herein.

That on the 10th day of April, 1919, an order was duly made and entered herein by the Honorable Augustus N. Hand whereby the transmission of a supplementary subpœna herein directed to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and [fol. 71] Emil Beer by the State Department of the United States

of America to said defendants through diplomatic channels should be deemed due and sufficient service of such subpoena.

That defendant has been duly informed by the Secretary of State that such subpoena was transmitted and that a copy of a letter from said defendants acknowledging receipt of the subpoena duly certified by the Spanish Consul was forwarded to said Secretary of State.

That on the 27th day of August, 1919, deponent wrote to the Secretary of State, asking whether the original subpoena had been returned by the Spanish Consul at Frankfort, and on the 3rd day of September, deponent was informed by the said Secretary of State that

"In reply you are informed that according to the department's records the original subpoena has not been returned."

That on the 21st day of August, 1919, by an order of the Honorable Julian W. Mack it was ordered that the supplemental subpoena issued herein directed to said defendants be served by publication as therein prescribed; that on account of the absence of the original supplemental subpoena as above stated, deponent has been unable to obtain from the clerk of this court an alias supplemental subpoena for the purpose of making such publication.

Wherefore deponent prays that an order be made herein directing that an alias supplemental subpoena be issued herein directed to [fol. 72] said defendants, to be published and mailed pursuant to said order.

That no previous application has been made for this order to any court or judge.

Charles W. Stockton.

Sworn to before me this 8th day of September, 1919. E. R. Whittingham, Notary Public, New York County. New York County Clerk's No. 316. New York Co. Register's No. 1173. Term expires March 30, 1920.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL SUBPÆNA

The President of the United States of America to Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and Emil Beer, co-partners, doing business under the firm name and style of Beer, Sondheimer & Company, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of [fol. 73] complaint exhibited against you in the said Court in a suit in Equity, by Frederick Y. Robertson, and to further do and

receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York at the City of New York on the 8th day of September, in the year one thousand nine hundred and nineteen and of the Independence of the United States of America the one hundred and forty-fourth.

Alex. Gilchrist, Jr., Clerk. Charles W. Stockton, Plaintiff's Solicitor.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the 20th day after service hereof, excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 74] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

Miles Monroe Messinger, Jr., being duly sworn, deposes and says that he is upwards of twenty-one years of age and a clerk in the office of Charles W. Stockton, the solicitor for the plaintiff in the above entitled suit; that on the 11th day of September, 1919, in conformity with the order herein of the Honorable Julian W. Mack made the 21st day of August, 1919, he duly deposited in the general post office in the Borough of Manhattan, City and County of New York, copies of the supplemental subpoena and of the aforesaid order, each [fol. 75] contained in a securely closed postpaid wrapper, directed to the following defendants respectively:

Nathan Sondheimer, Frankfort-on-the-Main, Germany.

Albert Sondheimer, Frankfort-on-the-Main, Germany.

Leo Wershner, Frankfort-on-the-Main, Germany.

Ludwig Beer, Frankfort-on-the-Main, Germany.

Emil Beer, Frankfort-on-the-Main, Germany.

Miles Monroe Messinger, Jr.

Sworn to before me this 20th day of October, 1919. E. R.
Whittingham, Notary Public, New York County. (Seal.)
New York County Clerk's No. 316. New York Co. Reg-
ister's No. 1173. Term expires March 30, 1920.

[fols. 76 & 77] STATE OF NEW YORK,
City and County of New York, ss:

John J. Cosgrove, being duly sworn, says that he is the Principal Clerk of the publisher of The New York Law Journal, a daily newspaper printed and published in the County of New York; that the advertisement hereto annexed has been regularly published in the said The New York Law Journal once a week for six successive weeks, commencing on the 12th day of September, 1919.

John J. Cosgrove.

Sworn to before me this 17th day of October, 1919. Joseph M. Devoy, Notary Public, Kings County No. 35. Certificate filed in New York Co. No. 80. Certificate filed in Bronx Co. No. 3.

SUPPLEMENTAL SUBPŒNA—Omitted; printed side page 72

[fol. 78] To Nathan Sondheimer, Albert Sonheimer, Leo Wershner, Ludwig Beer, and Emil Beer, co-partners, doing business under the firm name and style of Beer, Sondheimer & Company:

The foregoing supplemental subpœna is served upon you by publication, pursuant to an order of the Honorable Julian W. Mack, a Judge of the United States District Court, dated August 21, 1919, and filed in the office of the Clerk of the United States District Court, Southern District of New York.

Dated, New York, September 11, 1919.

Charles W. Stockton, Solicitor for Plaintiff, Office and P. O. Address 51 Broadway, Borough of Manhattan, City of New York, N. Y.

[fol. 79] STATE OF NEW YORK,
City and County of New York, ss:

Edgar Gallagher, being duly sworn, says that he is the Principal Clerk of the publisher of "The Evening Post," a daily newspaper printed and published in the City and County of New York; that the notice hereto annexed has been regularly published in said "The Evening Post" once a week for six successive weeks commencing on the 12th day of September, 1919.

Edgar Gallagher.

Sworn to before me this 17th day of October, 1919. James W. Jennings, Notary Public, New York County. (Seal.) New York County Clerk's No. 47; Reg. No. 1113. Commission expires March 30, 1921.

SUPPLEMENTAL SUBPŒNA—Omitted; printed side page 72

[fol. 80] To Nathan Sondheimer, Albert Sondheimer, Leo. Wershner, Ludwig Beer, and Emil Beer, co-partners, doing business under the firm name and style of Beer, Sondheimer & Company:

[fol. 81] The foregoing supplemental subpœna is served upon you by publication, pursuant to an order of the Honorable Julian W. Mack, a Judge of the United States District Court, dated August 21, 1919, and filed in the office of the Clerk of the United States District Court, Southern District of New York.

Dated, New York, September 11, 1919.

Charles W. Stockton, Solicitor for Plaintiff, Office and P. O.
Address 51 Broadway, Borough of Manhattan, City of New
York, N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT

Now come the defendants Francis P. Garvan, Alien Property Custodian, and successor in office to A. Mitchell Palmer as such official, and John Burke, Treasurer of the United States; and, not waiving the many defects and insufficiencies in the bill of complaint, but insisting upon the same, for answer to the amended bill of complaint, separately and severally, say:

I. That these defendants admit the averments of paragraphs Second, Fifth, Seventeenth, Twenty-fourth, Twenty-fifth and Twenty-sixth of the bill of complaint.

II. That the averments of the First paragraph of the bill of complaint are not true, in that defendant Francis P. Garvin is a citizen of the State of New York, of which State plaintiff claims to be a citizen; but these defendants state that the averments of this paragraph are immaterial, in that this court has jurisdiction by reason of the provisions of the Act of Congress known as the "Trading with the Enemy Act," and the amendments thereto.

III. That these defendants have no information sufficient to form a belief with respect to the averments of the Third and Twenty-third paragraphs; and therefore demand strict proof of said averments.

IV. That these defendants admit the Mammoth Copper Mining [fol. 83] Company is a Maine corporation, and is not and has not at any time been an enemy or ally of an enemy as defined in the Trad-

ing with the Enemy Act; but these defendants have no knowledge or information sufficient to form a belief with respect to the other averments of the Fourth paragraph, and therefore demand strict proof of such averments.

V. That these defendants admit that A. Mitchell Palmer on and prior to January 1, 1918, was the duly appointed, qualified and acting Alien Property Custodian of the United States, pursuant to the provisions of said Trading with the Enemy Act and the amendments thereto, and the proclamations and executive orders issued thereunder; but that said Palmer resigned said office heretofore, and defendant Garvin was, on, to wit, March 4, 1918, appointed his successor in the office of the Alien Property Custodian, and on such date duly qualified as such official; and since such date has been acting in such capacity.

For further answer to the Sixth paragraph of the bill of complaint, these defendants say that the Alien Property Custodian of the United States, pursuant to the authority invested in him as such official, did heretofore, after investigation, determine that certain property within the United States belonged to, or was held by, for, on account of, on behalf of, or for the benefit of the said German partnership of Beer, Sondheimer & Company, and that said partnership and the members thereof were enemies within the purview and meaning of [fol. 84] said Act, and the amendments thereto; and that said property is now held by the Alien Property Custodian as such official, pursuant to the provisions of said Trading with the Enemy Act and the amendments thereto. Defendants further say, however, that the said determination as heretofore made by the Alien Property Custodian is not final or conclusive in this action; that this Court should determine whether in fact such property at the time of its seizure by the Alien Property Custodian was the property of said enemy partnership, or any of the individual members thereof; and whether said property is subject to the satisfaction of the judgment, if any, which may be rendered in favor of plaintiff in this cause; and defendants further say with respect thereto that other persons in the United States claiming not to be enemies or allies of enemies have heretofore asserted ownership of part of said property; that these defendants hereby offer to submit full information in their possession with respect to said facts to this Court upon the trial of this cause.

VI. That so far as these defendants are informed and believe, the averments of paragraphs Seventh are correct; and the defendant Burke, as Treasurer of the United States, now holds the sum of, to wit, \$31,484.98 as money belonging to the said enemies named in the bill of complaint. Defendants state further, however, that the determination heretofore made by the Alien Property Custodian with respect to the ownership of such money by virtue of which determination the defendant Burke now holds said sum, is not binding or conclusive in this action; and this Court upon the final hearing [fol. 85] herein should ascertain and determine whether in fact such

money is subject to the payment of judgment, if any, which plaintiff may recover herein.

VII. That defendants admit the averments of paragraph Eighth, except with respect to said Benno Elkan and Otto Frohnknecht; and, although defendants admit that said individuals were in certain respects agents or representatives of the German co-partnership of Beer, Sondheimer & Company, defendants are not informed with respect to the extent of the power and authority of said Elkan and Frohnknecht to act for and bind said Beer, Sondheimer & Company with respect to the matters and things involved in this cause of action.

VIII. That upon information and belief and advice of counsel, these defendants deny the averments of paragraphs Ninth and Tenth, and demand strict proof thereof.

IX. That defendants admit the co-partnership of Beer, Sondheimer & Company between September 29th, 1914, and February 26, 1916, did receive from Mammoth Copper Mining Company of Maine certain amounts of zinc crude ore, and did pay to said Mammoth Company purchase price or value thereof; but, upon information and belief, these defendants deny the other averments of paragraph Eleventh.

[fol. 86] X. Upon information and belief and advice of counsel defendants deny the averments of paragraphs Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twentieth and Twenty-second.

XI. That in answer to paragraph Twenty-first, these defendants say that the Alien Property Custodian has heretofore determined, after investigation, that the entire capital stock of the said Beer, Sondheimer & Company, Inc., belonged to, or was held for the said co-partnership of Beer, Sondheimer & Company, and the members thereof; and said capital stock is now held by or for the Alien Property Custodian pursuant to seizure thereof by him subsequent to said determination. These defendants state further, as aforesaid, however, that said determination has been and is disputed, and this Court in this cause should ascertain and determine the facts with respect thereto.

XII. That without admitting or denying the averments of paragraph Twenty-seventh, which these defendants say are immaterial in so far as this cause of action is concerned, defendants say that this Court has jurisdiction to entertain this action by reason of the provisions of said Trading with the Enemy Act; but that it has such jurisdiction only and solely by reason of said statute.

[fol. 87] For further answer to the bill of complaint these defendants say:

XIII. That the bill of complaint fails to set forth a good cause of action for that:

(1) The contract sued upon, copy of which is attached to the bill of complaint, appears by its terms to have been executed on behalf of Mammoth Copper Mining Company of Maine subject to approval and there is no averment that said contract ever was approved by or became binding upon or otherwise was duly executed by the said Copper Mining Company;

(2) The contract sued upon appears by its terms to be void and unenforceable as a contract because of lack of mutuality, in that there was no obligation imposed upon the seller, Mammoth Copper Mining Company, to produce or ship any of the product purported to be sold;

(3) The contract sued upon appears by its terms to be void and unenforceable as a contract, by reason of uncertainty in that the product purporting to be sold and the amount thereof is not designated or determined with sufficient certainty;

(4) The averments of the bill of complaint fail to show with sufficient certainty that the said Mammoth Copper Mining Company has duly and sufficiently complied with all of the provisions of the contract sued upon, and has duly and sufficiently performed and done all things that require to be done and performed by it in order [fol. 88] that it might hold said Beer, Sondheimer & Company liable for the alleged breach upon its part of the terms of the performance of said contract.

For further answer to the bill of complaint these defendants say:

XIV. Upon information and belief that said Mammoth Copper Mining Company failed fully to carry out and perform the terms and conditions of the contract sued upon, whereby the said Beer, Sondheimer & Company became and were released from any further performance upon their part, and from any further acceptance of the product purported by said contract to be sold; and that said Beer, Sondheimer & Company accepted and paid for all of the said product tendered to it pursuant to the terms of the contract of which it became or was obligated to accept and pay for, as a result of which and by reason of which said Beer, Sondheimer & Company was not and is not now indebted to Mammoth Copper Mining Company, or plaintiff as assignee of said company, in the amount of damages now sued for, or in any other amount.

Francis G. Caffey, United States Attorney, Solicitor for Defendants Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer, of the United States.

[fol. 89] At a Stated Term of the District Court of the United States for the Southern District of New York Held in the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 19th Day of November, 1919.

[Title omitted]

Present: Hon. Learned Hand, U. S. D. J.

PRO CONFESSO ORDER DATED NOVEMBER 19, 1919

On reading and filing the affidavit of Charles W. Stockton, hereto [fol. 90] annexed, duly verified the 13th day of November, 1919, and on all papers and proceedings heretofore had herein, it is

Ordered that the bill of complaint be taken pro confesso against the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners, doing business under the firm name and style of Beer, Sondheimer & Company, and it is

Further ordered that within six months after the declaration of peace between the United States and Germany the defendants may apply herein to reopen this order and to contest the suit upon the merits. A copy of this order shall be mailed to the defendants addressed to them at Frankfurt-am-Main, Germany, before November 24, 1919.

Learned Hand, D. J.

[fol. 91] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES W. STOCKTON

STATE OF NEW YORK,
County of New York, ss:

Charles W. Stockton, being duly sworn, deposes and says that he is solicitor for the plaintiff herein. That this is an action for the breach of contract made on August 26, 1914, between the plaintiff's assignor, the Mammoth Copper Mining Company of Maine and the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners, doing business under the firm name and style of Beer, Sondheimer & Company, to accept and pay for approximately 9,525 tons of zinc crude ore.

[fol. 92] On information and belief that the said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are citizens of Germany residing at Frankfort-on-the-Main in said country and were at the commencement of this action and still are alien enemies within the meaning of the "Trading with the Enemy Act."

That the plaintiff commenced this action against A. Mitchell Pal-

mer, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, to establish the debt claimed by him against the said alien enemies by reason of their refusal to accept and pay for said ore.

By an order of the Honorable John C. Knox, a Judge of this Court, dated March 18, 1919, said complaint was amended by adding Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners, doing business under the firm name and style of Beer, Sondheimer & Company as party defendants.

That by an order of the Honorable Augustus M. Hand, a Judge of this Court, dated April 10, 1919, it was ordered that the transmission of the supplemental subpoena herein directed to said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners, doing business under the firm name and style of Beer, Sondheimer & Company, by the State Department of the United States of America to such defendants through diplomatic channels be deemed due and sufficient service of such subpoena. Upon information and belief that said subpoena was duly forwarded by said State Department through the Spanish Consulate at Frankfort and was duly served on said alien enemy defendants as prescribed in said order and proof of such service has been duly filed in the office of the Clerk of this Court on the 21st day of October, [fol. 93] 1919. The sources of deponent's information and the grounds for his belief are letters received by deponent from the State Department of the United States, and a letter from Beer, Sondheimer & Company, a copy of which, certified by the Spanish Consulate at Frankfort, Germany, is filed in the office of the Clerk of this Court.

That by an order of the Honorable Julian W. Mack, dated August 21, 1919, made before the return of said supplemental subpoena above stated, it was ordered that further service be made of such supplemental subpoena by publication and mailing as therein provided. That such publication and mailing have been duly made and proof thereof has been duly filed in the office of the Clerk of this Court on the 21st day of October, 1919. That more than 20 days have elapsed since said filing and that none of said defendants have appeared or answered herein and that all of said defendants are now in default.

Wherefore, deponent prays for an order of the form hereto annexed, directing that judgment be entered pro confesso against said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners, doing business under the firm name and style of Beer, Sondheimer & Company.

No previous application for this order has been made to any Court or Judge.

Charles W. Stockton.

Sworn to before me, this 13th day of November, 1919. E. R. Whittingham, Notary Public, New York County. New York Co. Clerk's No. 316; New York Co. Register's No. 1173; Term expires March 30, 1920.

[fol. 94] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

Miles Monroe Messinger, Jr., being duly sworn, deposes and says that he is upwards of 21 years of age and is a clerk in the office of Charles W. Stockton, solicitor for the plaintiff in the above entitled suit. That on the 20th day of November, 1919, in conformity with the order herein of the Honorable Learned Hand, made and entered on the 19th day of November, 1919, he duly deposited in the general post office in the Borough of Manhattan, City, County and State of New York, copies of said order with notice of entry, each contained in a securely closed post-paid wrapper directed to the following defendants respectively:

[fol. 95] Nathan Sondheim, Frankfort-on-the-Main, Germany.

Albert Sondheim, Frankfort-on-the-Main, Germany.

Leo Wershner, Frankfort-on-the-Main, Germany.

Ludwig Beer, Frankfort-on-the-Main, Germany.

Emil Beer, Frankfort-on-the-Main, Germany.

Miles Monroe Messenger, Jr.

Sworn to before me this 20th day of November, 1919. Edward R. Whittingham, Notary Public, New York County.
(Seal.) New York Co. Clerk's No. 316; New York Co. Register's No. 1173; Term expires March 30, 1920.

[fol. 96] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTION TO STRIKE OUT

Please take notice that on all the pleadings and proceedings herein, the undersigned will move this court at a Stated Term thereof to be held in the Post Office Building, Borough of Manhattan, City of New York, on Friday, December 5, 1919, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order

striking out paragraph XIII, of the answer herein under Equity Rule 33, and for such other or further relief as the court may grant.

Dated, New York, November 29, 1919.

Charles W. Stockton, Solicitor for Plaintiff, Office and Post
Office Address 51 Broadway, Borough of Manhattan, City
of New York.

To Hon. Francis G. Caffey, United States District Attorney, Solicitors for Defendants Garvan and Burke.

[fol. 97] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

MOTION TO STRIKE OUT

Now comes the plaintiff, Frederick Y. Robertson, by his solicitor Charles W. Stockton, and moves the Court under Equity Rule 33 to strike out paragraph XIII of the answer herein because the allegations thereof are insufficient to constitute an equitable or legal defense to the bill of complaint herein.

Dated, New York, November 29, 1919.

Charles W. Stockton, Solicitor for Plaintiff, Office and Post
Office Address 51 Broadway, Borough of Manhattan, New
York City.

[fol. 98] AT A STATED TERM OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK HELD IN THE UNITED STATES COURTS AND POST
OFFICE BUILDING, BOROUGH OF MANHATTAN, CITY OF
NEW YORK, ON THE 17TH DAY OF DECEMBER, 1919

[Title omitted]

Present: Hon. Julius M. Mayer, United States District Judge.

ORDER ON MOTION TO STRIKE OUT

This cause came on to be heard at this Term and was argued by counsel and thereupon upon consideration thereof, it was ordered, adjudged and decreed

[fol. 99] That the plaintiff's motion is hereby denied in so far as it concerns subdivision I of paragraph XIII of the answer herein; and it is further ordered, adjudged and decreed

That the plaintiff be permitted to serve and file within ten days from the entry of this order, a second amended petition setting forth that the contract sued upon, was duly proved and ratified by the Mammoth Copper Mining Company, with leave to the defendants, Francis P. Garvan and John Burke, to file their answer to said second amended petition within twenty days thereafter, and that this case shall retain its place upon the calendar notwithstanding the service of such amended petition and answer; and it is further ordered, adjudged and decreed

That subdivisions II, III and IV of paragraph XIII of the answer herein, be, and they hereby are stricken out as insufficient in law, without prejudice however, to the right of the defendants, Garvan and Burke to raise at the trial either by amendment of their answer or otherwise, any question as to the validity of the contract upon which this action is based by reason of uncertainty thereof, or lack of mutuality and without prejudice to the right of said defendants to move at the conclusion of the trial for a dismissal of the bill on the merits.

J. M. Mayer, U. S. D. J.

Consented to as to form. Charles W. Stockton, Solicitor for Plaintiff.

[fol. 100] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

SECONDED AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Frederick Y. Robertson, a citizen of the State of New York, residing in the Southern District thereof, brings this suit against Francis P. Garvan, a citizen and resident of said state, as Alien Property [fol. 101] Custodian, duly qualified and acting under the Federal Statute approved October 6, 1917, and known as "Trading with the Enemy Act"; against John Burke, a citizen and resident of the State of North Dakota, as Treasurer of the United States of America; Nathan Sondheimer, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Albert Sondheimer, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Leo Wershner, a citizen of Germany, residing at Frankfort-on-the-Main in said country; Ludwig Beer, a citizen of Germany, residing at Frankfort-on-the-Main in said country, and Emil Beer, a citizen of Germany, residing at Frankfort-on-the-Main in said country, and for his amended petition alleges:

First. That this suit is between citizens of different States and the sum or amount in controversy largely exceeds the sum or value of three thousand dollars, exclusive of costs and interest.

Second. That this suit arises under the Laws of the United States and this Court has jurisdiction hereof under said laws, and especially under an Act of Congress approved October 6, 1917, and known as the "Trading with the Enemy Act."

Third. That the plaintiff is a citizen and a resident of the State of New York, and is not and has not at any time herein mentioned been an enemy or an ally of an enemy, within the meaning of the said Act of Congress.

Fourth. That the Mammoth Copper Mining Company of Maine is and at all times hereinafter mentioned was a corporation organized [fol. 102] and existing under and by virtue of the laws of the State of Maine and neither said corporation nor any of its stockholders is or at any time has been an enemy or ally of an enemy as defined in said Act.

Fifth. Upon information and belief, that Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are and at all times hereinafter mentioned were citizens of Germany, residents of Frankfort-on-the-Main, Germany, alien enemies of the United States, as defined by the said Act, and co-partners doing business under the name and style of Beer, Sondheimer & Company, and that the home office of the said firm is and at all such times was at Frankfort-on-the-Main, Germany.

Sixth. That A. Mitchell Palmer on and before the first day of January, 1918, was the Alien Property Custodian, duly appointed, qualified and acting under and pursuant to the provisions of said "Trading with the Enemy Act," and as such and on or about the 22nd day of July, 1918, seized the money and property in the United States due or belonging to said alien enemies or of which said alien enemies are the owners, or in which they have a substantial interest; that defendant Francis P. Garvan is the duly appointed successor of said A. Mitchell Palmer, and said Francis P. Garvin now has in his custody and possession or under his control said money and property in the United States due or belonging to said alien enemies or of which said alien enemies are the owners, or in which they have a substantial interest.

Seventh. Upon information and belief, that John Burke is and at [fol. 103] all times hereinafter mentioned was the Treasurer of the United States of America, duly appointed, qualified and acting as such, and that as such Treasurer and under and pursuant to certain provisions of said Act known as the Trading with the Enemy Act, he has received and now has in his possession or custody certain moneys, constituting part of the property of the alien enemies herein mentioned.

Eighth. That the said co-partnership firm of Beer, Sondheimer & Company on and for a long time previous to the 29th day of September, 1914, and for approximately one year thereafter, was engaged in business in the State of New York and elsewhere in the United States of America, under the firm name of Beer, Sondheimer & Company, and that at all such times its business in New York City was conducted by or through certain managers or agents, to wit: Benno Elkan and Otto Frohnknecht.

Ninth. That on or about the 29th day of September, 1914, the Mammoth Copper Mining Company of Maine, and said co-partnership firm of Beer, Sondheimer & Company, duly entered into a certain contract in writing, subscribed by the said Mammoth Copper Mining Company of Maine and by said Beer, Sondheimer & Company as of date August 26, 1914, a copy of which said contract is annexed hereto, marked Exhibit "B," and made a part hereof; that thereafter said Mammoth Copper Mining Company of Maine duly ratified and approved the execution of said contract.

Tenth. That by the terms of said contract the Mammoth Copper [fol. 104] Mining Company of Maine contracted to sell and deliver to the said Beer, Sondheimer & Company at the smelting works of the said firm at Bartlesville in the State of Oklahoma or at such other works as the said Beer, Sondheimer & Company might designate, and the said Beer, Sondheimer & Company contracted to purchase and receive from the said Mammoth Copper Mining Company of Maine, all of the zinc crude ore running not less than thirty-three per cent metallic zinc which the Mammoth Copper Mining Company of Maine produced at and shipped from its said mine and property, between the said 29th day of September, 1914, and a date being one year after the date of the first shipment made after the completion of the picking plant which the Mammoth Copper Mining Company of Maine contemplated building. That the said picking plant was completed and the first shipment thereafter made on February 26, 1915.

Eleventh. Upon information and belief, that between the said 29th day of September, 1914, and the 26th day of February, 1916, the Mammoth Copper Mining Company of Maine produced and shipped from its said mine and property, ten thousand nine hundred seventy-four and three hundred thirteen thousandths (10,974.313) tons of said zinc crude ore, none of which ran less than thirty-three per cent metallic zinc; and that the said co-partnership firm of Beer, Sondheimer & Company accepted and received from the Mammoth Copper Mining Company of Maine, one thousand four hundred forty-eight and three hundred eighty-two thousandths (1,448.382) tons of said zinc crude ore and paid therefor at the prices stated in said contract, the sum of Thirty thousand nine hundred ninety-[fol. 105] seven and eighty-one hundredths (\$30,997.81) Dollars.

Twelfth. Upon information and belief, that the said Mammoth Copper Mining Company of Maine duly offered to deliver the remaining nine thousand five hundred twenty-five and nine hundred

thirty-one thousandths (9,525.931) tons of said zinc crude ore to the said Beer, Sondheimer & Company at its said smelting works at Bartlesville, Oklahoma, or any other works that the said firm might designate, but that the said Beer, Sondheimer & Company refused to receive the said nine thousand five hundred and twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore or any part thereof, and refused to pay for the same or any part of it, or to perform its said agreement in any respect further than performed as hereinbefore alleged, although the Mammoth Copper Mining Company of Maine duly tendered said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of said crude ore to said Beer, Sondheimer & Company, and has duly requested said Beer, Sondheimer & Company to accept the same and pay therefor and has otherwise in all respects complied with and performed, or tendered performance of the provisions of the said contract by it to be performed.

Thirteenth. That after the said Beer, Sondheimer & Company had refused to accept the said ore as hereinbefore alleged, the Mammoth Copper Mining Company of Maine sold the said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore for the best obtainable prices and [fol. 106] at the then market value, to wit: for the sum of Two hundred thirty-eight thousand two hundred seventy-eight and seventy-six hundredths (\$238,278.76) Dollars.

Fourteenth. That the amount which was due to be paid to the Mammoth Copper Mining Company of Maine by said Beer, Sondheimer & Company for said nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore at the prices stipulated in said contract is the sum of Five hundred eleven thousand one hundred three and sixty-four hundredths (\$511,103.64) Dollars.

Fifteenth. That the difference between said amount and the amount realized by the Mammoth Copper Mining Company of Maine in the sale of nine thousand five hundred twenty-five and nine hundred thirty-one thousandths (9,525.931) tons of zinc crude ore on the market is Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight hundredths (\$272,824.88) Dollars.

Sixteenth. That by reason of the premises and of the assignment hereinafter referred to by this plaintiff, said alien enemies became and are indebted, jointly and severally, to the plaintiff in the sum of Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight hundredths (\$272,824.88) Dollars, with interest from the dates payment became due under said contract to September 4, 1916, amounting to Sixteen thousand three hundred forty-two and fifty-four hundredths (\$16,342.54) Dollars, no part of which has been paid, although duly demanded.

[fol. 107] Seventeenth. That on or about the 25th day of August, 1915, a corporation under the name of Beer, Sondheimer & Co., Inc.,

was organized under the laws of the State of New York, which took over and thereafter conducted all the business in the United States of the said co-partnership firm or a very large part thereof, and that the said Benno Elkan and Otto Frohnknecht, who has theretofore conducted and managed the business of the said co-partnership firm of Beer, Sondheimer & Company, became respectively the President and Vice-President of the said domestic corporation Beer, Sondheimer & Co., Inc., and continued the operations and business theretofore conducted by and for the said co-partnership firm in the same offices at 61 Broadway, New York, as theretofore occupied by the said co-partnership firm.

Eighteenth. Upon information and belief, that an agreement was entered into between the said co-partnership firm Beer, Sondheimer & Company and the said corporation Beer, Sondheimer & Co., Inc., under which the said corporation took over all of the assets and property of the said co-partnership firm and certain of the liabilities of said co-partnership firm.

Nineteenth. That the purpose of the said co-partnership firm and also of the said Elkan and Frohnknecht in organizing the said corporation Beer, Sondheimer & Co., Inc., among other things was to evade the payment of the obligations of the said co-partnership firm to the said Mammoth Copper Mining Company of Maine.

Twentieth. Upon information and belief, that the said co-partnership firm and the members thereof, to wit: Nathan Sondheimer, [fol. 108] Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, were, on the 25th day of August, 1915, and still are the beneficial owners of assets and property in the United States, including those transferred to the said Beer, Sondheimer & Co., Inc., and that the organization of the said corporation and the pretended transfer of such assets and property to it was a device to defeat and defraud the creditors of the said partnership firm and especially the Mammoth Copper Mining Company of Maine.

Twenty-first. Upon information and belief that the beneficial ownership of the entire capital stock of the said corporation Beer, Sondheimer & Co., Inc., was on the 25th day of August, 1915, and at all times since that date vested in said co-partnership firm and the members thereof, and that the legal title of the said stock and all of it at all of said times has been in certain persons acting as trustees for the said co-partnership firm Beer, Sondheimer & Company or the members thereof.

Twenty-second. Upon information and belief, that the said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, conspiring together and with said Elkan and said Frohnknecht to defeat and defraud the said Mammoth Copper Mining Company of Maine, and plaintiff, organized or caused to be organized the said corporation, transferred or caused to be transferred the said property and assets, and concealed their ownership in the said capital stock of Beer, Sondheimer & Co., Inc., for the purpose of

deceiving, defeating and defrauding the creditors of the said co-partnership firm and especially the Mammoth Copper Mining Com-[fol. 109] pany of Maine and this plaintiff.

Twenty-third. That prior to the commencement of this action, and on or about the 27th day of September, 1916, the said Mammoth Copper Mining Company of Maine, for a valuable consideration, duly assigned and transferred to the plaintiff herein by a certain instrument in writing all claims and causes of action which it had against the said co-partnership firm Beer, Sondheimer & Company and the members thereof, arising under said contract of August 23, 1914, or otherwise.

Twenty-fourth. That on or about the 31st day of October, 1918, the plaintiff duly filed with the said A. Mitchell Palmer, then Alien Property Custodian, notice of plaintiff's said claim for said debt owing to plaintiff by said alien enemies, whose money and property in the United States has been conveyed, transferred, assigned and delivered or paid to the defendants under oath, in the form and containing such particulars as the said A. Mitchell Palmer, as Alien Property Custodian, required, as provided in Section 9 of the said Trading with the Enemy Act.

Twenty-fifth. That plaintiff has made no application to the President of the United States to order the payment, conveyance, transfer, assignment or delivery of said money or property or of any portion thereof, and the President has made no such order.

Twenty-sixth. The war referred to in Section 9 of said Trading with the Enemy Act has not yet ended.

[fol. 110] Twenty-seventh. That at all times hereinabove mentioned, the said enemies and all of them were and now are in Germany and beyond the jurisdiction of the courts of the United States or of any of said courts, and that no one has at any time been or now is designated, under statute of the State of New York or otherwise, as the representative or agent of them or of any of them, upon whom process could be served, and there is no property in this country belonging to them or any of them or in which they or any of them have any interest upon which an attachment can be levied, and plaintiff has been and is unable to effect service upon said co-partnership or any member of it, or to attach property or assets belonging to them, and he has no adequate remedy at law, and unless granted by this Court the right to establish herein his said debt and the relief herein prayed for, will suffer irreparable injury in that said enemies threaten to and will remove all their property from the United States and beyond the jurisdiction of the courts thereof.

Wherefore plaintiff prays the court to issue such process as may be necessary and require the said defendants to answer the complaint of the plaintiff, and after due hearing upon the issues of this action and the establishment of the debt claimed by plaintiff against the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner

and Ludwig Beer, and to order the delivery by the defendants Francis P. Garvin, as Alien Property Custodian and John Burke as Treasurer of the United States of America, to the plaintiff of so much of the said money and property of the defendants Nathan [fol. 111] Sondheimer, Albert Sondheimer, Leo Wershner and Ludwig Beer, as may be necessary to satisfy and discharge the said debt with interest thereon and the costs of this action, and for such other and further relief as the Court may deem proper. And the plaintiff will ever pray, &c.

Charles W. Stockton, Solicitor for Plaintiff, 51 Broadway,
New York, N. Y.

Affidavit of F. Y. Robertson to above paper omitted in printing.

[fol. 112] EXHIBIT "B" TO SECOND AMENDED BILL OF COMPLAINT

Ore Contract

This agreement made and entered into this 26th day of August, 1914, by and between the Mammoth Copper Mining Company of Kennett, California, a corporation existing under and by virtue of the laws of the State of Maine, party of the first part, and herein designated as the "Seller," and Beer, Sondheimer & Company, of New York City, N. Y., party of the second part, and hereinafter designated as the "Buyer."

Witnesseth:

That for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid by the parties hereto, and the mutual terms and agreements herein contained, the seller agrees to sell and deliver and the buyer agrees to purchase and receive the product hereinafter specified upon the terms and conditions hereinafter set forth.

Product

The product covered by this contract is the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California.

The buyer is not obligated to accept any of the product running less than thirty-three (33%) per cent metallic zinc. Should the seller produce a zinc product running less than thirty-three (33%) per cent metallic zinc, the buyer reserved the option to purchase [fol. 113] same under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere.

Period

This contract shall run for a period of one year from the date of first shipment made after the completion of the picking plant which

the seller contemplates building, but in no event shall the life of the contract exceed eighteen (18) months from the date of its execution.

Delivery

All of the product shall be delivered by the seller f. o. b. cars at the buyer's smelting works at Bartlesville, Oklahoma, or such other works as may be designated by the buyer. Provided that if there is any difference in freight between the shipping point and the smelting works so designated as against the freight rate between shipping point and Bartlesville, Oklahoma, the same shall be for the account of buyer. Shipments to be made in as near as possible equal weekly quantities.

Freight and Routing

The seller reserves the privilege of routing the shipments under this contract, as long as no extra cost is entailed thereby on the buyer.

Sampling

Sampling shall be done, free of charge, by the buyer. The seller [fol. 114] to have the privilege of having a representative present at those operations. Smelter weights and samples to govern, except that if the weights and sampling are not satisfactory to the seller, the question of weighing and sampling methods shall be decided by arbitration as hereinafter provided.

Assaying

Each of the parties hereto shall have assays made on the settlement samples. Should such assays agree within the splitting limits the average of same is to be taken for settlement. The splitting limits shall be:

Gold .....	.02 oz.
Silver .....	.4
Lead .....	.5%
Zinc .....	.5%
Iron	1.0%
Copper .....	.3%
Silica	1.0%

or any greater amounts mutually agreed upon.

Should the umpire's result fall between the two other results or above the higher or below the lower by an amount not exceeding the splitting limit, then the average of the umpire's result and the one nearest to it shall be taken for settlement. Should the umpire's result fall outside either of the other two results by an amount exceeding the splitting limit, then the umpire assay shall be disre-

garded and the nearest assay to the umpire's assay taken as final settlement.

[fol. 115] In every case, the party whose assay is farthest away from the umpire's assay, shall pay the umpire's charges.

Payments

Gold: 70% of the gold contents to be paid for at \$19.00 per oz.

Silver: 60% of the contents to be paid for at the New York price for silver according to Engineering & Mining Journal on date of shipment.

Lead: 60% of the contents to be paid for as per dry assay (wet less 1.5 units) at 40¢ per unit, if 5% dry or over. No pay if under 5% dry lead.

Copper: To be paid for as per wet assay less one unit, twenty pounds, at the E. & M. J. Price for wire bar copper for the E. & M. J.'s week of the date of the bill of lading less 5% per pound.

Iron: To be paid for at 10¢ per unit.

Zinc: \$19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt. For each unit of zinc in excess of 40%, a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

For each cent raise in the price of spelter above \$5.00 per cwt. a credit of 5¢ per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt. a debit of 5¢ per ton will be made. The price of spelter to govern [fol. 116] shall be that quoted in the Engineering & Mining Journal for the week of the date of the bill of lading.

Silica: To be charged for at 10¢ per unit.

Treatment Charge: \$3.25 per ton of ore or concentrates when payment for gold, silver, copper, lead and iron after deducting 10¢ per unit for silica amounts to \$3.75 per ton or more. If payments for gold, silver, lead and iron, less the penalty for silica do not amount to \$3.75 per ton of ore or concentrates, then no payment shall be made for gold, silver, lead and iron and no treatment charge or penalty on silica be assessed, and only the zinc contents will be considered in the accounting.

Terms: Cash upon agreement of assays.

Delays from Strikes, etc.

Whenever the production or shipment of ore by the seller or the receipt or treatment of the ore by the buyer is prevented or delayed by acts of nature or the public enemy, strikes, riots, fires, floods, financial disturbances, contingencies of transportation, the order, judgment or decree of any court, or the act of any public officer, or any cause whatever beyond the control of the party in exercising good faith is so prevented or delayed, which may be properly termed "Vis Major" or "Force Majeure," whether the same is included in the foregoing enumeration in express terms or otherwise, this agreement shall be suspended during such delay or prevention; the seller,

if so prevented or delayed in producing or shipping the ore hereby [fol. 117] contracted for, shall not be under any duty or obligation to furnish ore to the buyer, the production or shipment of which is so prevented or delayed, while the seller is so prevented or delayed, and the buyer if so prevented or delayed in receiving or treating the ore hereby contracted for, shall not be under any duty or obligation to receive any of the ore hereby contracted for, while so prevented or delayed. Upon the termination of the delay or interruption herein set forth, the obligation of the contracting parties shall be resumed.

Arbitration

If any differences arise between the parties hereto as to the interpretation and fulfillment of this contract, such questions shall be referred to a committee of arbitration, consisting of one arbitrator to be appointed by each party hereto. If said arbitrators are unable to agree, it shall be their privilege to choose an umpire and a decision of the majority shall be final. Every award or finding of such arbitrators shall be binding on both parties hereto. If either party fails to appoint an arbitrator within twenty (20) days after receipt of written notice requesting him to do so, it is hereby agreed that the decision shall be for the other party.

Notices

Any and all notices herein required to be given shall be deemed to be sufficiently served if the same be in writing and addressed to [fol. 118] the buyer at 61 Broadway, New York City, and to the seller at Newhouse Building, Salt Lake City, Utah.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written, binding their companies, partners, successors and assigns.

Executed in triplicate.

Mammoth Copper Mining Company (Subject to Approval),
By G. W. Metcalfe, General Manager. Witness: Geo. W.
Heintz. Beer, Sondheimer & Company, By Herbert Salinger,
Assistant Manager, Special Representative. Geo. W.
Heintz.

[fol. 119] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ANSWER TO SECOND AMENDED BILL OF COMPLAINT

Now come the defendants Francis P. Garvin as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, and not waiving the many defects and insufficiencies

in the bill of complaint as last amended by separate paper filed on the 23rd day of December, 1919, and particularly not waiving, but expressly reserving the rights to make suitable objection upon the [fol. 120] trial of this cause to the validity of the contract sued upon, pursuant to the provisions of the order of this Court entered herein on the 17th day of December, 1919, for answer to said bill of complaint as last amended as aforesaid, say:

I. That these defendants admit the averments of paragraphs Second, Fifth, Seventeenth, Twenty-fourth, Twenty-fifth and Twenty-sixth of the amended bill of complaint or petition herein.

II. That the averments of the First paragraph of the amended bill of complaint are not true, in that defendant Francis P. Garvan is a citizen of the State of New York, of which State plaintiff claims to be a citizen; but these defendants state that the averments of his paragraph are immaterial, in that this Court has jurisdiction by reason of the provisions of the Act of Congress known as the "Trading with the Enemy Act," and the amendments thereto.

III. That these defendants have no information sufficient to form a belief with respect to the averments of the Third and Twenty-third paragraphs; and therefore demand strict proof of said averments.

IV. That these defendants admit the Mammoth Copper Mining Company is a Maine corporation, and is not and has not at any time been an enemy or ally of an enemy as defined in the Trading with the Enemy Act; but these defendants have no knowledge or information sufficient to form a belief with respect to the other averments of the Fourth paragraph, and therefore demand strict proof of such averments.

[fol. 121] V. That these defendants admit that A. Mitchell Palmer on and before the 1st day of January, 1918, was the duly appointed, qualified and acting Alien Property Custodian of the United States, pursuant to the provisions of said Trading with the Enemy Act and the amendments thereto, and the proclamations and executive orders issued thereunder, and that the defendant Francis P. Garvan is the duly appointed successor of said A. Mitchell Palmer in the office of the Alien Property Custodian, and since March 4, 1918, has been acting in such capacity.

For further answer to the Sixth paragraph of the amended bill of complaint, these defendants say that the Alien Property Custodian of the United States, pursuant to the authority invested in him as such official, did heretofore, after investigation, determine that certain property within the United States belonged to, or was held by, for, on account of, on behalf of, or for the benefit of the said German partnership of Beer, Sondheimer & Company, and that said partnership and the members thereof were enemies within the purview and meaning of said Act and the amendments thereto; and that said property is now held by the Alien Property Custodian as such official, pursuant to the provisions of said Trading with the Enemy Act and the amendments thereto. Defendants further say,

however, that the said determination as heretofore made by the Alien Property Custodian is not final or conclusive in this action; that this Court should determine whether in fact such property at the time of its seizure by the Alien Property Custodian was the property of said enemy partnership, or any of the individual members [fol. 122] thereof; and whether said property is subject to the satisfaction of the judgment, if any, which may be rendered in favor of plaintiff in this cause; and defendants further say with respect thereto that other persons in the United States claiming not to be enemies or allies of enemies have heretofore asserted ownership of all or part of said property and have instituted suits in this court to establish their claims thereto; that these defendants hereby offer to submit full information in their possession with respect to said facts to this Court upon the trial of this cause.

VI. That so far as these defendants are informed and believe, the averments of paragraph Seventh are correct; and the defendant Burke, as Treasurer of the United States, now holds the sum of, to wit, \$31,484.98 as money belonging to the said enemies named in the amended bill of complaint. Defendants state further, however, that the determination heretofore made by the Alien Property Custodian with respect to the ownership of such money by virtue of which determination the defendant Burke now holds said sum, is not binding or conclusive in this action; and this Court upon the final hearing herein should ascertain and determine whether in fact such money is subject to the payment of judgment, if any, which plaintiff may recover herein.

VII. That defendants admit the averments of paragraph Eighth, except with respect to said Benno Elkan and Otto Frohnknecht; and, although defendants admit that said individuals were in certain respects agents or representatives of the German co-partnership of [fol. 123] Beer, Sondheimer & Company, defendants are not informed with respect to the extent of the power and authority of said Elkan and Frohnknecht to act for and bind said Beer, Sondheimer & Company with respect to the matters and things involved in this cause of action.

VIII. That upon information and belief and advice of counsel, these defendants deny the averments of paragraphs Ninth and Tenth, and demand strict proof thereof.

IX. That defendants admit the co-partnership of Beer Sondheimer & Company between September 20, 1914, and February 26, 1916, did receive from Mammoth Copper Mining Company of Maine certain amounts of zinc crude ore, and did pay to said Mammoth Company the purchase price or value thereof; but, upon information and belief, these defendants deny the other averments of paragraph Elventh.

X. Upon information and belief and advice of counsel, defendants deny the averments of paragraphs Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twentieth and Twenty-second.

XI. That in answer to paragraph Twenty-first these defendants say that the Alien Property Custodian has heretofore determined, after investigation, that the entire capital stock of the said Beer, Sondheimer & Company, Inc., belonged to, or was held for the said co-partnership of Beer, Sondheimer & Company and the members thereof; and said capital stock is now held by or for the Alien Property Custodian pursuant to seizure thereof by him subsequent [fol. 124] to said determination. These defendants state further, as aforesaid, however that said determination has been and is disputed, and this Court in this cause should ascertain and determine the facts with respect thereto.

XII. That without admitting or denying the averments of paragraph Twenty-seventh, which these defendants say are immaterial in so far as this cause of action is concerned, defendants say that this Court has jurisdiction to entertain this action by reason of the provisions of said Trading with the Enemy Act; but that it has such jurisdiction only and solely by reason of said statute.

For a further answer to the amended bill of complaint these defendants say:

XIII. That the plaintiff has no cause of action for that:

(1) The alleged contract sued upon was and is void and unenforceable as a contract because of lack of mutuality in that there was no obligation imposed upon the seller Mammoth Copper Mining Company, to produce or ship any of the product purported to be sold.

(2) The alleged contract sued upon was and is void and unenforceable as a contract by reason of uncertainty in that the product purporting to be sold and the amount thereof is not designated or determined with sufficient certainty.

[fol. 125] For a further answer to the amended bill of complaint these defendants say:

XIV. Upon information and belief that said Mammoth Copper Mining Company failed fully to carry out and perform the terms and conditions of the contract sued upon, whereby the said Beer, Sondheimer & Company became and were released from any further performance upon their part, and from any further acceptance of the product purported by said contract to be sold; and that said Beer, Sondheimer & Company accepted and paid for all of the said product tendered to them pursuant to the terms of the contract which they became or were obligated to accept and pay for, as a result of which and by reason of which said Beer, Sondheimer & Company were not and are not now indebted to Mammoth Copper Mining Company, or plaintiff as assignee of said company, in the amount of damages now sued for, or in any other amount.

Francis G. Caffey, United States Attorney, Solicitor for Defendants Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States.

[fol. 126] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

#586

[Title omitted]

OPINION

C. W. Crockton, Solicitor for Complainant; Alfred Sutro (of San Francisco), Counsel.

Francis G. Caffey, United States Attorney, Solicitor for Defendants; William Travers Jerome and Harland B. Tibbetts, Counsel.

[fol. 127] AUGUSTUS N. HAND, District Judge:

On September 29, 1914, the Mammoth Copper Mining Company entered into a contract with Beer, Sondheimer & Company, dated August 24, 1914, reciting a consideration of

"one dollar each to the other in hand paid * * * and the mutual terms and agreements"

therein contained, whereby the former agreed to sell and deliver and the latter to purchase and receive

"the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California."

The buyer was not bound to accept any of the product running less than 33% metallic zinc, but if the seller should produce such zinc the buyer reserved

"the option to purchase same under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere."

"All of the product" (runs the contract) "shall be delivered f. o. b. cars at the buyer's smelting works at Bartlesville * * * shipments to be made in as near as possible equal weekly quantities."

The following clause of the contract regulates the payments for zinc content:

[fol. 128] "Zinc: \$19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt.

For each unit of zinc in excess of 40%, a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

For each cent raise in the price of spelter above \$5.00 per cwt., a credit of 5¢ per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt., a debit of 5¢ per ton will be made. * * *

The contract was to run one year after the completion of the picking plant which the seller contemplated building, but in no event should

"the life of the contract exceed (18) months from the date of its execution."

The picking plant was completed March 5, 1915, and prior to the refusal of Beer, Sondheimer & Company to receive further shipments, 1,448,881 tons were shipped and paid for. According to the testimony of Salinger, which is uncontradicted Eardley, who negotiated the contract for the Mining Company, mentioned four or five hundred tons per month as the amount of zinc that the Mining Company expected to produce.

Metcalf, the manager of the Mining Company, stated at the trial that if the price of spelter became so low that mining was unprofitable, the company would probably ship no ore.

[fol. 129] On October 22, 1914, in reply to a telegram by Salinger as to expectations of production, Metcalf answered:

"Zinc ore tonnage depends altogether on market price of spelter" (Defts.' Exhibit J);

and on October 25th, Metcalf telegraphed:

"With spelter quotations below five shipments will be very light. If it rises above five will probably ship about 200 tons per month" (Defts.' Exhibit H).

On November 23, Metcalf further telegraphed:

"If spelter remains above five estimate December tonnage at 200" (Defts.' Exhibit N).

The Mammoth Company shipped to Beer-Sondheimer about 230 tons in November, 84 tons in December, 140 tons in January, 500 tons in February and in March, up to the 17th, 800 tons appear to have been shipped. Further shipments were also made that month.

At the end of February, the price of spelter had reached more than \$9.00 per cwt., whereas it was less than \$5.00 in October; about \$5.00 in November; about \$5.50 in December, about \$6.00 in January and about \$8.00 in March. Thus it appears to have greatly risen after January.

On March 17, Beer-Sondheimer telegraphed the Mammoth Company as follows:

"Are advised you shipped from March sixth to ninth fifty tons zinc ore daily whilst your average shipments since beginning [fol. 130] contract amounts to only about two hundred tons monthly. In view of abnormal conditions we will only accept tonnages reasonably equal to the average monthly amount shipped heretofore. We are unable to receive and smelt any further tonnages in accordance page five of our contract with you. We have advised all other shipments accordingly."

On March 23, the buyers again telegraphed:

"Understand so far eight hundred tons have arrived Bartlesville. Repeat we are unable to accept such tonnages and request you to act accordingly."

On March 24th, the buyers telegraphed:

"Referring our yesterday's telegram received further two bill ladings. Cannot accept. What shall we do with bill-ladings?"

The Mammoth Company thereafter tendered all the zinc crude ore produced of the grade of 40% metallic zinc content, or higher, which tender was refused.

The clause of the contract referred to in the letter of March 17th, was the vis major clause common to business contracts. It cannot, however, be successfully contended that any vis major existed which would excuse performance of a valid contract, and I do not understand that any such position is taken by any of the parties here.

The complainant, who as assignee of the Mammoth Copper Mining [fol. 131] Company, has succeeded to the rights and obligations of Beer, Sondheimer & Company, sues the Alien Property Custodian under §9 of the Trading with the Enemy Act.

The defendants resist the suit principally on the ground that the agreement between the original parties was void for lack of consideration.

The instrument can be construed in three ways. It can be regarded as involving only an obligation to sell all the product which the Mammoth Copper Mining Company might produce and to dispose of such product to no other persons than Beer, Sondheimer & Company during the term of the contract, leaving the seller free to produce what it chose. Such an interpretation was placed upon an agreement similar to the present one in the cases of Ramey Lumber Company vs. John Schroeder Lumber Co., 237 Fed., 39; H. F. Pfann & Co. vs. J. C. Turner Cypress Lumber Co., 194 Fed., 69, and Kenan, McKay & Spier vs. Yorkville Cotton Oil Co., 260 Fed., 28; Burton vs. Great Northern Ry., 9 Exch., 507; Williston on Contracts, §104.

In a second class of cases it has been held that a consideration based upon abstention from dealing is so unreal and so profitless to the buyer that it could never have been intended by the parties, especially where, as here, it was not in literal terms expressed.

What the buyers particularly wanted of the seller was ore for their smelters, and not an agreement not to ship to others. Viewed in this light, an agreement which contained no words of promise by the seller to deliver either a fixed amount, or an average amount, or an amount necessary to meet the requirements of the business of the buyer, was held by the Court of Appeals of this Circuit in Munson SS. Line vs. Grimwood, 249 Fed., 722, to be dependent on the mere desire of the seller for its immediate advantage. In that case, the Munson Line agreed to provide transportation for

"all of the coal and coke shipped by Grimwood from January, 1913, to December 31, 1915."

The Circuit Court of Appeals of this Circuit held that evidence of Grimwood's dealings with the Munson Line, prior to the date of the agreement, was competent to determine whether it might be supported as a requirement contract, and said in a dictum:

"We may add, however, that, had no offer to show the extent and nature of Munson's previous knowledge of Grimwood's requirements been made, and the Trial Court had held the contract a 'will, wish or want' agreement, we should have agreed with such ruling.
* * *

The Court goes on to say that in so far as the Ramey case (237 Fed., 39)

"seems to assert that an agreement otherwise void, as depending for effect on the will, wish, want or whim of one party, is validated merely by the promise of such party to abstain from dealing in respect of the subject in hand, with any person other than the second party, we are compelled to think it inadvertently used and to disagree."

I believe the court in reaching the conclusion that the agreement in the Munson case could not be supported unless it could be made [fol. 133] out to be a requirement contract, must have done so because it did not regard the implied negative covenant not to ship by other lines as the real consideration bargained for. In other words, the Munson Line wanted cargo for its ships, not abstention from shipping by other lines. If a consideration based upon such abstention were eliminated, and a "requirement" clause could not be justly implied, the court thought that no promise remained on the part of Grimwood to support a contract. The Grimwood contract, however, was somewhat different from the one here. Grimwood seems to have owned no coal mine. He simply bought and shipped when he found it profitable and practicable to do so. He had entirely ceased to ship coal for some time before suddenly resuming and demanding a number of ships from the Munson Line to carry a large tonnage. It was easy under such circumstances for the court to regard such a highly speculative transaction as based upon the mere whim of Grimwood. In the present case the facts more nearly resemble those related in the opinion of Judge Mayer in *Select Pictures Corporation vs. Australasian Films*, 260 Fed., 296, and in the case of *Ramey Lumber Co. vs. John Schroeder Lumber Co.*, *supra*.

The third class of cases is that in which the law implies from the business relations and conduct of the parties an implied agreement on the part of the seller to continue producing in good faith. These cases assume that there is an average or contemplated output of the mine or lumber business which is about to be produced and that the seller will not consult his own interest in developing the material

[fol. 134] contracted for, but will in so far as is consistent with the nature of the plant furnish the means of carrying out the understanding of the parties.

American Distributing Co. vs. Hayes Wheel Co., 250 Fed. 109.
Pittsburgh Plate Glass Co. vs. H. Neuer Glass Co., 253 Fed., 161.

DuPont de Nemours vs. Schlottman, 218 Fed., 353.

Kenan, McKay & Spier vs. Yorkville Cotton Oil Co., 260 Fed., 28.

Wells vs. Alexandre, 130 N. Y., 642.

Wigand vs. Bachmann-Betchel Brewing Co., 222 N. Y., 273.

The Mammoth Copper Mining Company was about to construct a picking plant with which to separate its ore. It was plainly contemplated by the parties that when this plant was installed, ore should be produced and shipped from it. It was completed in March, and the Mining Company began to increase its output accordingly. This fact, rather than Metcalf's theories as to his legal obligations, is important. The Mining Company attempted in good faith to carry out its part of the contract until it was stopped.

Whether the contract under consideration falls under the first class I have mentioned, as I believe it does (see Williston on Contracts, Sec. 104), or under the third, there is ample consideration to support it. In no event can I believe that the Munson case would go so far as to nullify a contract to sell the entire product of a mine on the ground that it lacks consideration.

[fol. 135] Defendant's contention that the clause of the agreement "shipped from its properties," contemplated a literal shipping, rather than a mere delivery, does not impress me. I think it in no way differs from the succeeding clause relating to an opinion to purchase ore running less than 33% metallic zinc. In each case it seems reasonable to regard the understanding of the parties to have been that the Mammoth Copper Mining Company would sell and deliver all the ore which it produced to Beer, Sondheimer & Company.

The argument of complainant's counsel that the clause of the agreement:

"in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid"

establishes that the contract has a sufficient consideration, is not convincing. The decisions relied upon are principally leases where a grant might be supported even without consideration.

Guffey vs. Smith, 237 U. S., 101.

Limley vs. Raydure, 249 Fed., 675.

In the case of Lawrence vs. McCalmont, 2 How., 426, there was not only not an exchange of nominal considerations, but there existed the most valuable consideration of advances upon a letter of credit.

That a trifling sum if intended as the real consideration will sup-

port a contract is undoubtedly the case. But the real considerations intended were evidently mutual promises, and the promise of the Mining Company was no more than to ship when, and if, and to the extent it produced ore. Mere reciprocal receipts of one dollar are not [fol. 136] ordinarily sufficient. In *Velis Motor Car Co. vs. Kopmeier Motor Car Co.*, 194 Fed., at page 331, the Court said:

"* * * The phrase of the contract which reads, 'and of \$1.00 each to the other paid,' etc., imports no consideration. As said by the trial judge, it may well mean the exchange of the same dollar."

This view appears to be approved by Professor Williston in his *Book on Contracts*, Sec. 115, at page 241, and there is no more thoughtful and eminent American authority on the subject.

The claim that partial performance prevents the defendants from questioning the validity of the agreement is equally unconvincing. It could not render a contract valid which lacked mutuality. The only right a partial performance of an agreement without consideration gives is that of recovery of the value of anything furnished. The right of action in such a case is not in assumpsit on the contract, but in indebitatus assumpsit. If the buyers here had not exchanged mutual promises which created a valid bilateral contract, they would only be liable to pay at the agreed price for such shipments of zinc as were made before they refused to take further deliveries. This is plain from the opinion of Circuit Justice Holmes in *Sterling Coal Co. vs. Silver Springs Bleaching & Dyeing Co.*, 162 Fed. 848; and of Judge Sanborn in *Cold Blast Transportation Co. vs. Kansas City Bolt & Nut Co.*, 114 Fed., 77, as well as from general principles.

As for the suggested estoppel involved in the construction of the picking plant, it nowhere exists. An estoppel technically requires a [fol. 137] representation as to an existing fact and there was none made by Beer, Sondheimer & Company. If the construction of the plant has any bearing on the matters in issue, it must be on the theory that it was a consideration promised, or, at the request of Beer, Sondheimer & Company, furnished in exchange for a promise on their part to take the output. There was certainly no promise by the Mammoth Copper Mining Company to construct this plant, nor any request by the buyers that it be constructed. Under all these circumstances, I cannot see that the construction of the picking plant is a material factor either as affording a basis for an estoppel, or an element of consideration.

The claim of the defendants that the Mammoth Company broke the contract by failing to ship ore "in as near as possible equal weekly quantities" is without merit. No objection was made to the deliveries on this ground, so that the breach was waived as to all ore accepted. As for the ore tendered in March, acceptance of which was refused, the objection to taking it, was based solely on the vis major clause. It is too late now to claim a breach on other grounds. More than this, there is no evidence that the Mammoth Company did not ship as nearly weekly quantities "as possible." The picking plant was only just installed and full production was only just

Shows purpose to ship. bears

getting under way when Beer, Sondheimer & Co. refused to take ore. *Farrelly vs. United States*, 159 Fed., 671.

The contention that complainant does not come into equity with clean hands is equally unsound. I do not think it true that the American Metal Company in effect had a contract for the ore in question [fol. 138] which it could specifically enforce against the Mammoth Company. It is true it had a contract with the United States Smelting Company, which held all the stock of the Mammoth Company, and that this contract appears to have literally embraced the ore in question. But specific performance could not be enforced against the Mammoth Company, or Beer, Sondheimer & Co., by reason of a prior contract with the parent company for ore which the latter did not as a corporation own. The contract between the American Metal Company and the parent company was made in June, 1914, and only one month later that company, at the request of Metcalfe, seems to have attempted to sell the Mammoth ores to the American Metal Company. This shows that the prior contract was not in mind and that the clause which strictly covered any interest the parent company had in the Mammoth ore body was not thought by any of the parties to embrace those ores.

The separate corporate identity of the Mammoth Company and the United States Smelting Company was complete and there are too many theoretical and practical objections to treating the American Metal Company's contract as enforceable against Beer, Sondheimer & Co., to make the contention as to unclean hands tenable. Moreover, there is an entire absence of mala fides.

On the whole case, I find that Beer, Sondheimer & Co., broke the contract, and that the complainant must prevail.

An interlocutory decree is granted in favor of the complainant with a reference to Lewis L. Delafield, Esq., to report as to complainant's damages.

A. N. H., D. J. June 29, 1920.

[fol. 139] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Present: Hon. Augustus N. Hand, District Judge.

INTERLOCUTORY DECREE—Filed June 28, 1920

[fol. 140] This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

That the complainant do recover of defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, the damages resulting from such refusal of said defendants to receive, accept and pay for the total production of zinc crude ore shipped by the said Mammoth Copper Mining Company of Maine

from its properties in Shasta County, California, during the period covered by the said contract dated August 26, 1914, together with his costs, charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed that the defendants, Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, pay over to the plaintiff from the property and money of said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, held by said Francis P. Garvan, as Alien Property Custodian, and said John Burke, as Treasurer of the United States of America, the amount of such damages, costs, charges and disbursements.

And it is further ordered, adjudged and decreed that it be referred to Wallace McFarlan, residing in the City of New York, as master pro hac vice, his experience in such matters being found by the Court a sufficient reason for such appointment, to ascertain, take, [fol. 141] state and report to the Court the amount of ore shipped by the said Mammoth Copper Mining Company of Maine from its properties in Shasta County, California, under the terms of said contract dated August 26, 1914, which said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer refused to accept, and the amount of damages which the plaintiff has suffered by reason of the failure and refusal of said defendants to receive, accept and pay for said ore.

And it is further ordered adjudged and decreed that the complainant on such reference have the right to cause the examination of said defendants or any of their agents and employees, and also the production of the books, vouchers and documents of said defendants, and that said defendants attend for said purpose before said master from time to time as said master shall direct.

And it is further ordered, adjudged and decreed that the hearing before said master commence not later than September 8, 1920, and proceed with all reasonable dispatch, and that said master do make and file his report with the clerk of this court to await the further order of this court.

(Signed) Augustus N. Hand, D. J.

Entered in the office of the Clerk of the District Court for the Southern District of New York, August 3, 1920.

[fol. 142] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

MASTER'S REPORT

To the Judges of the District Court of the United States for the
Southern District of New York:

Pursuant to an interlocutory decree of this court, duly made and entered herein on the third day of August, 1920, by which it was referred to Wallace MacFarlane as special master—

[fol. 143] "to ascertain, take, state and report to the court the amount of ore shipped by the said Mammoth Copper Mining Company of Maine from its property in Shasta County, California, under the terms of said contract dated August 26, 1914, which said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer refused to accept, and the amount of damages which the plaintiff has suffered by reason of the failure and refusal of said defendants to receive, accept and pay for said ore,"

I, Wallace McFarlane, the said special master, respectfully report as follows:

Pursuant to notice duly given, hearings began before me on September 8, 1920, and continued on subsequent days, at which the parties appeared as follows:

The plaintiff by Charles W. Stockton and K. E. Stockton, his attorneys and counsel.

The defendants, Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, by Francis G. Caffey, United States Attorney for the Southern District of New York, as their attorney, and William Travers Jerome and Harland B. Tibbetts, of counsel.

The defendants, composing the firm of Beer, Sondheimer & Company did not appear, either individually or as a firm, in person or by attorney.

[fol. 144] Findings of Fact

This action is brought by the plaintiff as assignee of the Mammoth Copper Mining Company, a Maine corporation, operating mines at Kennett, Shasta County, California, against Beer, Sondheimer & Company, a German firm, the Alien Property Custodian, and the Treasurer of the United States of America, pursuant to Section 9 of the Trading with the Enemy Act, to establish against property of Beer, Sondheimer & Company, taken over by the Alien Property Custodian, a claim for damages alleged to have been sustained by the Mammoth Copper Mining Company from the breach by the defendants, Beer, Sondheimer & Company, of a certain contract to

sell zinc ore, made in writing on or about August 26, 1914, between the Mammoth Copper Mining Company as seller, and Beer, Sondheimer & Company as buyers, by the terms of which the buyers, Beer, Sondheimer & Company, agreed to purchase the whole zinc product of the Mammoth Copper Mining Company during a period of eighteen months from the date of the contract. The alleged breach was the refusal of Beer, Sondheimer & Company in April, 1915, to accept further deliveries of ore, and their complete repudiation of the contract from that time.

The individual members of the firm of Beer, Sondheimer & Company were and are citizens of Germany, residing in Frankfort-on-the-Main in that country, and, at the time of the transactions which are the subject of this action, had extensive business interests in the United States.

By the terms of the contract, hereinafter more particularly referred to, the deliveries of ore were to be made by the Mammoth Copper [fol. 145] Mining Company to Beer, Sondheimer & Company at Bartlesville, in the State of Oklahoma, or at such other smelting works in the United States as from time to time might be designated by the buyer.

The Mammoth Copper Mining Company, after the repudiation of the contract by Beer, Sondheimer & Company, and on or about July 26, 1915, sold the rejected ore to the United States Smelting Company on account of the contract with Beer, Sondheimer & Company for what the seller claims was the best available price. The agreement of resale was evidenced by letters from the United States Smelting Company to the Mammoth Copper Mining Company accepted by the latter.

The claim is one made by the seller in a contract to sell against the buyer for damages for the buyer's refusal to accept and pay for ore produced and tendered after the buyer's repudiation of the contract, in which the seller has exercised its right of resale, and the damages are measured by the difference between the contract price under the contract with the original buyer and the price actually obtained on the resale.

The breach of contract by Beer, Sondheimer & Company and their liability for damages are established by the interlocutory decree, and the master's function is to determine the amount of the damages which the plaintiff has suffered by the breach.

The contract between the Mammoth Copper Mining Company and Beer, Sondheimer & Company is as follows:

This agreement made and entered into this 26th day of August, 1914, by and between the Mammoth Copper Mining Company of [fol. 146] Kennett, California, a corporation existing under and by virtue of the laws of the State of Maine, party of the first part, and hereinafter designated as the "Seller," and Beer, Sondheimer & Company, of New York City, N. Y., party of the second part, and hereinafter designated as the "Buyer."

Witnesseth:

That for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid by the parties hereto, and the mutual terms and agreements herein contained, the seller agrees to sell and deliver and the buyer agrees to purchase and receive the product hereinafter specified upon the terms and conditions hereinafter set forth.

Product

The product covered by this contract is the total production of zinc crude ore shipped by the seller from its properties in Shasta County, California.

The buyer is not obligated to accept any of the product running less than thirty-three (33%) per cent metallic zinc. Should the seller produce a zinc product running less than thirty-three (33%) per cent metallic zinc, the buyer reserved the option to purchase same under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere.

[fol. 147]

Period

This contract shall run for a period of one year from the date of first shipment made after the completion of the picking plant which the seller contemplates building, but in no event shall the life of the contract exceed eighteen (18) months from the date of its execution.

Delivery

All of the product shall be delivered by the seller f. o. b. cars at the buyer's smelting works at Bartlesville, Oklahoma, or at such other works as may be designated by the buyer. Provided that if there is any difference in freight between the shipping point and the smelting works so designated as against the freight rate between shipping point and Bartlesville, Oklahoma, the same shall be for the account of buyer. Shipments to be made in as near as possible equal weekly quantities.

Freight and Routing

The seller reserves the privileges of routing the shipments under this contract, as long as no extra cost is entailed thereby on the buyer.

Sampling

Sampling shall be done, free of charge, by the buyer. The seller to have the privilege of having a representative present at those operations. Smelter weights and samples to govern, except that if the [fol. 148] weights and sampling are not satisfactory to the seller, the question of weighing and sampling methods shall be decided by arbitration as hereinafter provided.

Assaying

Each of the parties hereto shall have assays made on the settlement samples. Should such assays agree within the splitting limits the average of same is to be taken for settlement.

The splitting limits shall be:

Gold .....	.02 oz.
Silver .....	.4 "
Lead .....	.5%
Zinc .....	.5%
Iron	1.0%
Copper .....	.3%
Silica	1.0%

or any greater amounts mutually agreed upon.

Should the assays fail to agree within the splitting limits, an umpire assay shall be made by the following chemists, each chemist to be taken in rotation:

Ledoux & Company, New York City
 Pitkin & Company, New York City
 J. W. Richards, Denver, Colo.
 Leonard & Root, Denver, Colo.
 Officer & Company, Salt Lake City, Utah
 Union Assay Office, Salt Lake City, Utah

Should the umpire's result fall between the two other results or above the higher or below the lower by an amount not exceeding [fol. 149] the splitting limit, then the average of umpire's result and the one nearest to it shall be taken for settlement. Should the umpire's result fall outside either of the other two results by an amount exceeding the splitting limit, then the umpire assay shall be disregarded and the nearest assay to the umpire's assay taken as final settlement.

In every case the party whose assay is farthest away from the umpire's assay, shall pay the umpire's charges.

Payments

Gold: 70% of the gold contents to be paid for at \$19.00 per oz.

Silver: 60% of the contents to be paid for at the New York price for silver according to Engineering & Mining Journal on date of shipment.

Lead: 60% of the contents to be paid for as per dry assay (wet less 1.5 units) at 40¢ per unit, if 5% dry or over.

No pay if under 5% dry lead.

Copper: To be paid for as per wet assay less one unit, twenty [fol. 150] pounds, at the E. & M. J. price for wire bar copper for the E. & M. J.'s week of the date of the bill-of-lading less 5¢ per pound.

Iron: To be paid for at 10¢ per unit.

Zinc: \$19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt.

For each unit of zinc in excess of 40%, a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

For each cent raise in the price of spelter above \$5.00 per cwt., a credit of 5¢ per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt., a debit of 5¢ per ton will be made.

The price of spelter to govern shall be that quoted in the Engineering & Mining Journal for the week of the date of the bill of lading.

Silica: To be charged for at 10¢ per unit.

Treatment Charge: \$3.25 per ton of ore or concentrates when payment for gold, silver, copper, lead and iron after deducting 10¢ per unit for silica amounts to \$3.75 per ton or more. If payments for [fol. 151] gold, silver, lead and iron less the penalty for silica do not amount to \$3.75 per ton of ore or concentrates then no payment shall be made for gold, silver, lead, and iron and no treatment charge or penalty on silica be assessed and only the zinc contents will be considered in the accounting.

Terms: Cash upon agreement of assays.

Delay from Strikes, etc.

Whenever the production or shipment of ore by the seller or the receipt or treatment of the ore by the buyer is prevented or delayed by acts of nature or the public enemy, strikes, riots, fires, floods, financial disturbances, contingencies of transportation, the order, judgment or decree of any court, or the act of any public officer, or any cause whatever beyond the control of the party in exercising good faith is so prevented or delayed, which may be properly termed "Vis Major" or "Force Majeure," whether the same is included in the foregoing enumeration in express terms or otherwise, this agreement shall be suspended during such delay or prevention the seller if so prevented or delayed in producing or shipping the ore hereby contracted for, shall not be under any duty or obligation to furnish ore to the buyer, the production or shipment of which is so prevented or delayed, while the seller is so prevented or delayed, and the buyer if so prevented or delayed in receiving or treating the ore hereby contracted for, shall not be under any duty or obligation to receive any of the ore hereby contracted for, while so prevented or delayed. Upon the termination of the delay or interruption herein set forth, the obligation of the contracting parties shall be resumed.

Arbitration

If any differences arise between the parties hereto as to the interpretation and fulfillment of this contract, such questions shall be referred to a committee of arbitration, consisting of one arbitrator to be appointed by each party hereto. If said arbitrators are unable to agree, it shall be their privilege to choose an umpire and a decision of the majority shall be final. Every award or finding of such arbitrators shall be binding on both parties hereto. If either party

fails to appoint an arbitrator within twenty (20) days after receipt of written notice requesting him to do so, it is hereby agreed that the decision shall be for the other party.

Notices

Any and all notices herein required to be given shall be deemed to be sufficiently served if the same be in writing and addressed to the buyer at 61 Broadway, New York City, and to the seller at Newhouse Building, Salt Lake City, Utah.

[fol. 153] In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written, binding their companies, partners, successors and assigns.

Executed in triplicate.

Mammoth Copper Mining Company (Subject to Approval),
By G. W. Metcalfe, General Manager. Beer, Sondheimer
& Company, By Herbert Salinger, Assistant Manager, Special Representative. Witness: Geo. W. Heintz. Geo. W. Heintz.

The agreement of resale is evidenced by the following letters:

(Letterhead of U. S. Smelting Co.)

(Rubber Stamp:) M. C. M. Co. Rec'd Jul. 2-1915. Ans'd —

Kansas City, Mo., 7-21-15.

Mr. G. W. Metcalf,
Genl. Mgr. Mammoth Copper Mining Co.,
Kennett, Calif.

DEAR SIR:

We submit below terms under which we are willing to receive and pay for your zinc product running 32% zinc or better:

[fol. 154] Delivery: F. O. B. Altoona, Kansas.

Sampling: At our works free of charge.

Assaying: Each of the parties hereto will have assays made and compare same. Should they agree within .5% zinc the average of same shall be taken in settlement. Should the assays not agree within .5% zinc an umpire assay shall be made by the following chemists each to be taken in rotation: Union Assay Office, Salt Lake City; Chrisman & Nichols, Salt Lake City; Von Sultz & Low, Denver, Colo. In the event of umpire, the middle assay will be taken in final settlement.

Payment: \$18.00 per ton for a product containing 40% metallic zinc when spelter is selling in St. Louis according to the Engineering and Mining Journal at \$5.00 per cwt.

For each per cent zinc above 40% a credit of \$1.50 will be allowed.

For each per cent zinc below 40% a charge of \$2.00 will be made.

For each cent rise in the price of spelter above \$5.00 per cwt. and up to \$11 per cwt. a credit of \$.03 will be allowed. No credit for the rise in price above \$11.00 per cwt.

For each cent drop in the price of spelter below \$5.00 per cwt. a charge of \$.05 will be made.

Price of spelter to govern in settlement shall be that as quoted in the E. & M. J. for the E. & M. J.'s week of arrival at destination plant.

Lime: 1% allowed free; excess to be charged for at \$1.00 per unit.

Residues made from the treatment of this material to be shipped to best advantage for your account.

[fol.155] Your acceptance of above terms will constitute a contract between us which may be cancelled upon five days' written notice by either party.

Yours very truly, W. H. Eardley. WHE-W."

"United States Smelting Company

Kansas City, Mo., March 8, 1916.

Mr. G. W. Metcalfe,

Gen. Mgr. Mammoth Copper Mining Co.,
Kennett, Calif.

DEAR SIR:

As stated in previous letters, we have figured out a basis which we can apply in figuring the value of the precious metals, namely, gold, silver and copper in Kennett ores.

In December we had a cut off and have taken the actual settlements received for all residues made from all Kennett ores treated up to the cut off and have worked out the basis given below. By applying this basis to each individual lot treated up to the cut off, it would give the Kennett company \$135.45 more than they actually receive. This figures only about 2½¢ a ton so that we are safe in applying this basis on any lots of Kennett ore which are yet unsettled and as per another letter written you today, we will hereafter apply [fol. 156] this basis, so that you will get complete settlement on all shipments without waiting until the residues have actually been shipped and returns received.

Basis

Gold: 65% of contents to be paid for at \$19.00 per ounce, providing the gold contents are .03 ounces per ton or more.

Silver: 65% of the contents to be paid for at the New York price for date of shipment.

Copper: 60% of the wet assay to be paid for less 1 unit at the E. & M. J.'s price for cathode copper for the E. & M. J.'s week of shipment less 6¢ per pound.

Treatment charge \$3.85 per ton.

You should now be able to figure the amount you will receive for any of the lots still unsettled for.

Yours very truly, W. H. Eardley.

[fol. 157] United States Smelting Company

(Rubber Stamp:) M. M. Co. Rec'd Mar. 24. Ans'd —.

Kansas City, Mo., March 20, 1916.

Mr. G. W. Metcalfe,
General Manager Mammoth Copper Mining Co.,
Kennett, California.

DEAR SIR:

Will you kindly change our letter of March 8th giving basis which we are applying on the residue values on all lots shipped prior to March 1st, for which you have not received settlement, making the quotational date for silver and copper the date of arrival instead of the date of shipment, and week of shipment respectively.

We find that the date of arrival was used in making our calculations on this product.

Our letter of the 8th giving terms applying on shipments on and after March 1st, can remain as it is, as it makes little difference as to what date is used as long as the same rule is always applied.

Yours very truly, W. H. Eardley.

[fol. 158] The Mammoth Copper Mining Company, at the time of the execution of the said contracts and during the whole period of the transactions involved in this action, was a corporation organized and existing under the laws of the State of Maine.

During the same period the United States Smelting Company was a corporation organized and existing under the laws of one of the States of the United States, not specified in the evidence, although all parties agree that it was such a corporation.

All the stock of both of these companies was owned by the United States Smelting, Refining & Mining Company, a corporation also organized and existing under the laws of the State of Maine. This company will be referred to in this report as the "Holding Company" to avoid confusion with the very similar name of its subsidiary, the United States Smelting Company.

The executive officers and the boards of directors of the subsidiary companies and of the Holding Company were substantially identical, but each of the subsidiary companies had a separate general manager and an operating staff of its own.

The financial accounts of the subsidiary companies were kept in the office of the Holding Company in Boston, Mass., and in its books. In the settlements between the Mammoth Company and the United States Smelting Company on the contract of resale of the ore rejected by Beer, Sondheimer & Company, no cash passed between the seller and buyer, but settlement sheets of the different shipments were made out in due form just as they would have been between companies that were entire strangers to each other, and the United States Smelting Company transmitted the amount shown by [fol. 159] the settlement sheets to be due to the Mammoth Com-

pany by sending to that company a credit voucher and at the same time sending a similar voucher to the head office of the Holding Company in Boston, and the Mammoth Company was duly credited and the United States Smelting Company debited, on the books of the Holding Company with the amount of such voucher.

When the directors of either subsidiary desired to declare a dividend, they met as such directors at Boston in the office of the Holding Company, and declared the dividend, and by appropriate book-keeping entries the amount thereof was transferred on the books from the account of the Mammoth Company or the Smelting Company, as the case might be, to the credit of the Holding Company. This system was not peculiar to the contract in this case, but was the regular course of business between the Holding Company and its subsidiaries.

In their transactions with the public the subsidiary companies made contracts in their own names and through their own offices. When payments were due to or from them on account of such contracts, however, they were commonly made to or by the Holding Company.

The subsidiary companies maintained local bank accounts at the places where their plants were situated, to meet pay-rolls and current expenses of operations. These accounts were maintained in funds by drafts drawn upon the Holding Company, but not through receipts derived from the business transactions of the subsidiaries and directly received by them. Most of the disbursements of these subsidiaries appear to have been made by voucher drafts drawn by them upon the Holding Company.

[fol. 160] The evidence shows that the United States Smelting Company made a profit on the sale of the spelter recovered from the Mammoth ore over and above the cost of the ore, of the smelting and of the marketing of the spelter, but does not disclose with accuracy the rate or amount of this profit.

For convenience of computation in determining the amount of the damages, the plaintiff has divided the rejected ore into three divisions:

(1) Ore actually shipped to Beer, Sondheimer & Company at Bartlesville, and there rejected by them and stored on account of the plaintiff (Plaintiff's Exhibit 16).

(2) Ore produced at the Mammoth mine after the repudiation but before the contract of re-sale had been made, and stored in the Mammoth Company's plant (Plaintiff Exhibit 21).

(3) Ore purchased after the contract of re-sale had been made, and shipped directly to the United States Smelting Company at Altoona, Kansas, or Iola, Kansas, as produced (Plaintiff's Exhibit 23).

All this rejected ore was eventually delivered to the United States Smelting Company, and paid for by it pursuant to the contract of re-sale. These divisions are not important for the purposes of this report, but attention is called to them to explain the exhibits, and

especially the form of Plaintiff's Exhibit 123, a computation setting forth the plaintiff's claim as finally submitted to the master. This exhibit, which as to certain items, the master does not accept, is as follows:

[fol. 161]

PLAINTIFF'S EXHIBIT 123

Memorandum of Amount Claimed to be Due from Beer-Sondheimer & Co. (Without Interest)

Being a revision of the Memorandum, Exhibit #98, made so as to deduct from the amount paid the M. C. M. Co. by the U. S. S. Co. minimum amount for Lot 42 shipped to Bartlesville, as per Exhibit #16, deduction having been made on Exhibit #98 from the total amount that Beer-Sondheimer should have paid for the ore involved in suit of the amount claimed on account of this Lot 42.

A. Amount that Beer, Sondheimer should have paid for ore:

Exhibit #16	\$42,048.66	
Correction for freight deductions improperly made (Exhibit #27-1)	20,506.92	
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	62,555.58	
Deduction on account Lot #42 less than 33% (See Transcript, pages 72 and 197), including freight Exn. #16) ..	1,323.46	
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Total amount ore of Exhibit #16	61,232.12	\$61,232.12
Exhibit #21	165,193.91	
Correction for freight deductions improperly made (Exhibit #27-1)	41,199.88	
	<hr/>	
[fol. 162] Total amount ore of Exhibit #21	206,393.79	206,393.79
Exhibit #23	303,861.07	
Correction for freight deductions improperly made (Exhibit # 27-2),	86,772.10	
	<hr/>	
	390,633.17	
Deduction for Concentrates	23,754.53	
	<hr/>	
Total amount ore of Exhibit #23	366,878.64	366,878.64
Total that should have been paid by Beer-Sondheimer		<hr/>
		634,504.55

B. Amount actually received from U. S. S. Co. by M. C. M. Co:

Exhibit #16	\$28,968.93	
Correction for freight deductions improperly made (Exhibit #28-1).	19,463.53	
	<hr/>	
	48,432.46	
Deduction ore account Lot #42	1,039.99	
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	47,392.47	\$47,392.47
Exhibit #21	61,152.34	
Correction for freight deductions improperly made (Exhibit #28-1).	26,781.00	
	<hr/>	
	87,933.34	87,933.34
[fol. 163] Exhibit #23	134,504.66	
Correction for freight deductions improperly made (Exhibits #28-1 and 2) ..	60,032.87	
	<hr/>	
	194,537.53	
Deduction for Concentrates	9,680.09	
	<hr/>	
	184,857.44	184,857.44
Exhibit #30 Residues	13,652.83	
Deduction for Concentrates.....	945.63	
	<hr/>	
	12,707.20	12,707.20
		<hr/>
		332,890.45
Corrections (Exhibit #29)		691.40
		<hr/>
Amount actually paid by U. S. S. Co. (B) ..		332,199.05
Amount Beer-Sondheimer should have paid (A)		634,504.55
		<hr/>
Amount claimed to be due from Beer-Sondheimer & Co. without interest		302,305.50

Explanation of Items in Plaintiff's Exhibit 123 Residues

In addition to the metallic zinc content in the ores produced by the Mammoth Company were small quantities of gold, silver and other metals which, in the original contract as well as in the contract of resale and in the evidence are included in the general term "residues."

[fol. 164] Under the original contract these residues were paid for by Beer-Sondheimer & Company pursuant to the contract terms while they continued to perform. Under the contract of resale they were for a time sold by the United States Smelting Company for

the account of the Mammoth Company, but later, by modification of the original contract of resale, were purchased by the United States Smelting Company and paid for it in its settlements with the Mammoth Company.

Concentrates

In its shipments of the rejected ore, both prior and subsequent to the contract of resale, the Mammoth Company included a certain class of ore described as "concentrates"; that is to say, ore which had been put through a certain preliminary process of treatment before shipment. The United States Smelting Company received and paid for these concentrates. Later, it was decided by the Mammoth Company that the concentrates were not within the contract description of the ores produced under either the original contract to sell or the contract of resale, and in its proof deductions were made for those items, that is to say,—from the total price of the ore computed pursuant to the terms of the original contract with Beer, Sondheimer & Company the plaintiff deducted for concentrates in Ex-

hibit 123	\$23,754.53
From the amount actually received by the Mammoth Company from the United States Smelting Company plaintiff, in the same exhibit, deducted for concentrates on zinc ores	9,680.09
And on residues	945.63
In all	<u>\$10,625.72</u>

[fol. 165] There was always a loss of ore in transit from Kennett to the smelter, and that loss on the shipments containing the concentrates was not prorated in Exhibit 123 between the quantity of concentrates and contract ore in the same shipments, but was deducted in full from the weight of the concentrates. In that way Beer, Sondheimer & Company were charged with the full amount of the contract ore in the shipment without any deduction for loss in transit. The defendant—having made this criticism in their brief, the plaintiff in his reply brief has prorated the loss in transit, and this requires certain corrections to be made in the computations contained in Exhibit 123 as follows:

Deduction for concentrates under the Beer, Sondheimer & Company contract (Subd. A of Ex. 123)	\$24,821.41
Making the total net claim without deductions for freight under the Beer, Sondheimer & Co. contract (Subd. of A Ex. 123)	<u>\$633,437.67</u>
Deduction for concentrates under the resale contract (Subd. B of Ex. 123) on zinc ores	\$10,204.81
Residues	981.
	<u>\$11,185.81</u>

[fol. 166] Making the total net claim without deduction
for freight under the resale contract (Subd. B of Ex.
123) 331,638.96

Making plaintiff's total net claim for damages according
to Ex. 123 as corrected \$301,798.71

Ex. 123. 34
The assays and analyses of the ore made by the United States Smelting Company and by the Mammoth Copper Mining Company were fair and accurate, and were fairly and reasonably applied in the settlement sheets upon which settlements under the contract of resale were made between the United States Smelting Company and the Mammoth Copper Mining Company and in the computation of the "hypothetical damage sheets," showing what Beer, Sondheimer & Company would have been liable to pay to the Mammoth Copper Mining Company for the ore pursuant to the original contract to sell.

Findings relating more particularly to the correct deduction to be made for freight in computing the obligation of Beer, Sondheimer & Company to the Mammoth Copper Mining Company under the original contract.

Between August 26, 1914, and the completion of performance under the contract of resale in February, 1916, freight on zinc ore [fol. 167] between Kennett and Bartlesville, Oklahoma, and between Kennett and Altoona and Iola, Kansas, and on zinc residues between Altoona and Iola, Kansas, and Chrome, N. J., was governed by a special "commodity" rate graduated according to the value of carload shipments of at least a specified minimum weight. The rate on equal values was the same between Kennett and the aforesaid points in Oklahoma and Kansas.

Plaintiff's Exhibit 9, introduced in evidence on the deposition of G. W. Cushing, correctly represents the table of valuations and corresponding rates as they were stated in the official tariff filed pursuant to law with the Interstate Commerce Commission.

In the said official tariff the values given in the graduated table, to which the published rates are applied, are described as "actual value per ton of 2,000 pounds."

No evidence has been introduced explanatory of the meaning of the words "actual value" used in the official tariff to describe and limit the graduated values upon which the special commodity rates, aforesaid, were based, but, in the opinion of the master, the words "actual value" mean a value determined, within not too rigid, but reasonably flexible limits, by the general or established market price at the time of shipment in respect of commodities as to which there was an established market price; and where there was not, this "actual value" may properly be determined by the price agreed upon between the shipper and consignee, that is to say, the net invoice or contract price of the shipment.

In the bills of lading issued to the Mammoth Company by the Southern Pacific Railroad Company at Kennett (Plaintiff's Ex. 34) [fol. 168] for shipments to Beer, Sondheimer & Company at Bartles-

ville of the thirty-four consignments received and paid for by Beer, Sondheimer & Company before their repudiation of the contract, an apparently perfunctory valuation of \$25 per ton is written, but in fact (as shown in detail in Plaintiff's Exhibit 31) Beer, Sondheimer & Company settled with the railroad company for the freight after the assay and analysis had been made, paying the appropriate rate upon the net contract value computed pursuant to the contract terms.

In the bills of lading issued for shipments made to the United States Smelting Company after the contract of resale had been made, the bills of lading (Plaintiff's Exs. 35, 36 and 37) all state a valuation of \$40 per ton, with the words "subject to Smelter's Report" underwritten, and the United States Smelting Company settled with the railroad company for the freight, after the assay and analysis of the ore had been made, upon the net contract value of the ore pursuant to the terms of the contract of resale between the United States Smelting Company and the Mammoth Copper Mining Company.

Under both contracts the freight so paid, whether by Beer, Sondheimer & Company on the shipments accepted and paid for by them, or by the United States Smelting Company, was paid on account of the shipper, the Mammoth Copper Mining Company, and deducted from the gross price of the ore in the settlement sheets between the parties. The amount of the freight on the rejected ore Computed according to the contract with Beer, Sondheimer & Company is \$148,478.90
Computed on the resale contract, the amount is 106,277.40

The difference is \$42,201.50

[fol. 169] Findings Relating More Particularly to the Demand for Interest

From the time of the repudiation of the contract by Beer, Sondheimer & Company in April, 1915, to the completion of performance of the contract of resale between the Mammoth Company and the United States Smelting Company in February, 1916, there was no available general market and no current market price or current quotations for zinc ore in the United States. The value of zinc ore is determined by the amount of its metallic content, and the value of its metallic content is determined by the current price of spelter, for which there was always a general market and a current market price. During the period under consideration, the price of spelter rose from a price of about five cents a pound in August, 1914, when the original contract to sell was made, to over twenty cents a pound in the early summer of 1915. It fluctuated greatly, and during the whole period of delivery under the contract of resale the average price of spelter was about fourteen cents a pound.

This high price of spelter stimulated greatly the domestic production of zinc ore. The supply of such ores in the domestic market was still further increased by unusually large exportations of such ores to the United States from Australia, Japan, Spain and Mexico. These countries were large producers of such ores, and had sold

their product prior to the war chiefly in the German markets, from which they had been excluded by the war. Between April, 1915, and February, 1916, the supply of zinc ores in the domestic market offered for sale was greatly in excess of the capacity of the zinc [fol. 170] smelters, to which alone such ores could be sold. Sales could be made only by persistent shopping among the smelters until one was found which would consent to take the ore on any terms at all, and then by endeavoring to make the best terms that the smelter would concede. The price that could be exacted from any smelter consenting to buy the ore on any terms, depended upon the operating conditions then existing at that particular plant. Such market as there was for these ores was strictly a buyer's market, unrelieved by competitive conditions, and owing to the superabundant supply of zinc ore and the restricted capacity of zinc smelters in the United States, the potential value of such ores, as measured by their metallic content and the current price of spelter, could not be realized by sellers of ore. The contract of resale between the Mammoth Copper Mining Company and the United States Smelting Company, and similar contracts of which evidence was given, did not reflect an established market or current price of such ores, but indicated only the terms of those particular bargains between seller and buyer (Eardley, Minutes, pages 369-373; deposition of George Blow).

78-134 ✓
In the market conditions disclosed by the evidence, the price obtained by the Mammoth Company from the United States Smelting Company in the contract or resale did not represent a current market price for such ore, but did represent the best price that the Mammoth Company could obtain after energetic efforts in good faith to sell the ore.

[fol. 171] Prior to the commencement of this action, neither the plaintiff nor the Mammoth Copper Mining Company notified the defendants Beer, Sondheimer & Company of the terms of the contract of resale, or of the quantities of said rejected ore shipped to the United States Smelting Company from time to time, or of the metallic content of such shipments as shown by the assays and analysis upon which the settlements therefor were made between the United States Smelting Company and the plaintiff's assignor.

On or about the 29th day of June, 1916, a summons and complaint, annexed to Plaintiff's Exhibit 127 as "Schedule A," in a certain action brought by the Mammoth Copper Mining Company against Beer, Sondheimer & Co., Inc., a corporation, in the District Court of Salt Lake County in the State of Utah, were served on one Herbert Salinger in Salt Lake City, Utah, copies of which were sent by him to Benno Elkan and Otto Frohnknecht at No. 61 Broadway, New York City, on or about the 10th day of July, 1916, and thereby said Salinger, Elkan and Frohnknecht were, respectively, at or about the dates of such service, informed of such facts in respect to the claim upon which the instant action was subsequently brought as were set forth in said complaint, "Schedule A" of said exhibit.

On or about the 29th day of September, 1916, Frederick Y. Robertson, as plaintiff, brought an action in the Supreme Court of the State of New York, in the County of New York, against Beer, Sondheimer & Company, Inc., and the individual members of Beer,

Sondheimer & Co., who are defendants in the instant case, and the said Benno Elkan and Otto Frohnknecht and certain other persons [fol. 172] designated by fictitious names, as defendants, in which action a summons and complaint in the form annexed to said exhibit as "Schedule B" were on or about said date served upon said Elkan, Frohnknecht and Beer, Sondheimer & Co., Inc., in which such defendants appeared by attorney; that no personal service was ever obtained upon the individual members of Beer, Sondheimer & Co. who are defendants in the instant case, but that an order was obtained for service by publication upon them, which was vacated and set aside; and that by the service of said complaint the defendants in that action upon which it was served were on or about September 29, 1916, informed of such facts in respect to the claim upon which the instant action was subsequently brought as were set forth in said complaint, "Schedule B" of said exhibit.

The period of sixty-one days after the date of shipment of the various lots of ore included under the Beer, Sondheimer & Company contract would have been a reasonable time to allow Beer, Sondheimer & Company to make payment for the rejected ore under the terms of their contract; and interest, if recoverable, would properly be computed on each shipment of ore from the end of such period, with a corresponding deduction for interest earnable on the payments made by the United States Smelting Company under the contract of resale from the date of each payment.

Interest calculated by this method on plaintiff's net claim as made in their Exhibit 123 (\$302,305.50), hereinbefore set forth, computed to April 1, 1920, amounts to \$77,466.58 (Plaintiff's Exhibits 124, 125, 126).

If it is finally decided that the plaintiff is entitled to interest, this computation is subject to revision corresponding to the amount of [fol. 173] damages finally allowed and the date from which, in that event, it may be decided interest should commence to run.

For the reasons hereinafter stated, I have concluded that the plaintiff is not entitled to recover interest.

I find and state the claim of the plaintiff as allowed, as follows:

The total net quantity of ore produced and shipped by the Mammoth Company under the terms of its contract dated August 26, 1914, which the defendants, Beer, Sondheimer & Company in violation of their contract refused to accept was, after all allowed deductions, 18,296,512 pounds, equivalent to 9,148,257 tons of 2,000 pounds each.

Total gross value of rejected ores, computed according to the terms of the contract of August 26, 1914, with Beer, Sondheimer & Company, before deductions for freight which the buyer would have paid on account of the seller and deducted from this gross value, the said gross value being calculated upon the spelter price obtaining at the time when the several shipments would have been made to Beer, Sondheimer & Company had they not repudiated their contract

\$633,437.61

Brought forward	\$633,437.61
[fol. 174] The freight which Beer, Sondheimer & Company, had they performed the contract, would have paid upon these shipments on the shipper's account, computed upon the net contract price of the rejected ore pursuant to the terms of the contract with Beer, Sondheimer & Company, would have been	148,478.90
Leaving as the net amount which Beer, Sondheimer & Company would have been obligated to pay the plaintiff had they performed the contract	\$484,958.71

The amount which the Mammoth Company actually received from the United States Smelting Company under the contract of resale, I find as follows:

Gross value of ore sold and delivered to United States Smelting Company under the contract of sale before deductions for freight paid by United States Smelting Company on account of shipper	\$331,638.96
The freight which United States Smelting Company paid on account of the shipper computed on net contract values pursuant to the terms of the contract of resale	106,277.40

[fol. 175] Leaving the amount actually received by the Mammoth Company on account of the ores sold and delivered to the United States Smelting Company pursuant to the contract of resale	225,361.56
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The difference between the net amount actually received by the Mammoth Company on the contract of resale, and the net amount which Beer, Sondheimer & Company would have paid had they performed their contract, is, exclusive of interest.....	259,597.21
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The difference between this sum and Exhibit 123 consists of two items:

(1) Final net correction in concentrate allowance	\$506.79	
(2) Difference in freight deduction to be made in computing obligation of Beer, Sondheimer & Company under their contract	42,201.50	\$42,708.29
		<hr/>
Net amount of claim in Exhibit 123.....		\$302,205.50

[fol. 176] I do therefore respectfully report that the amount of damages which the plaintiff has suffered by reason of the failure and refusal of the defendants Beer, Sondheimer & Company to receive, accept and pay for said ore is two hundred and fifty-nine thousand five hundred and ninety-seven and 21/100 dollars (\$259,597.21).

Some expression of the master's reasons for his conclusions on the questions decided by him may be helpful to the Court in reviewing the report.

There is, on the evidence, no material dispute of fact. The defendants have introduced no evidence contradictory of the testimony and voluminous exhibits presented on behalf of the plaintiff, though they have subjected both to some criticism.

The defendants argue, first, that in view of the relations of the Mammoth Company and the Smelting Company, on the one hand, to the United States Smelting, Refining and Mining Company, on the other, the distinct corporate entities of the subsidiaries should be disregarded and the Holding Company treated as the sole party to these transactions on the side of the seller. This proposition once established, the defendants contend that the contract of alleged resale was not a contract at all; that the Holding Company, as seller, simply elected upon the buyer's default to treat the unaccepted merchandise as its own and to carry it on to a further stage of production and dispose of it as spelter for its own profit. Such ultimate profit, if any, they contend, derived from the sale of the spelter recovered from the Mammoth ore must be credited to Beer, Sondheimer & Company in reduction of damages under well settled rules in respect of the duty of a seller, upon the buyer's default, to take every reasonable means to make the loss as light as possible. The defendants assert, also, that the evidence shows *prima facie* not only a profit, but a large profit, on the sale of the spelter after deducting the whole cost of production and of smelting the ore and marketing the spelter, and that if their computation of the profit is inaccurate the burden is upon the plaintiff to prove what it actually was.

I think this point goes directly to the amount of damages, and that the master is not concluded from considering it by the trial and interlocutory decree.

Obviously, if the separate corporate entities of the Mammoth Company and the Smelting Company are to be regarded, and their legal

capacity to make contracts and to sue and be sued, upheld, although the Holding Company was their sole stockholder, the rest of defendants' argument on this point and the authorities cited become immaterial.

On the evidence adduced, I must find that the Mammoth Company acted in good faith in making the contract of sale with the Smelting Company, and entered into it only after an honest and energetic effort to find a more favorable purchaser. I have found all the material facts in respect to the concentration of corporate functions in the Holding Company, but the situation disclosed is not at all unfamiliar or unusual. There is nothing shown inconsistent with the separate legal entity of the subsidiary companies. There is no evidence that they were used by the Holding Company for any fraudulent or unlawful purpose, to defeat a statute, or to maintain a monopoly or defraud creditors. The case, it seems to me, clearly falls within the principle of such authorities as *In re Watertown Paper Co.*, 109 Fed., 262, and *Holland vs. Holland City Gas Co.*, [fol. 178] 257 Fed., 679, 681, and *United States vs. Milwaukee Refrigerator Transit Co.*, 142 Fed., 247, 255, in which Judge Sanborn said:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction or a mere mental creation; or that the idea of invisibility or intangibility is a sophism. A corporation as expressive of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty."

I conclude that there is no reason for ignoring the legally distinct corporate personalities of the Mammoth Company and the U. S. Smelting Company. The contract of resale must be held to be a valid sale although the sole stockholder of both seller and buyer was the Holding Company.

Freight

By the terms of its contract with Beer, Sondheimer & Company, the shipper was bound to deliver the ore f. o. b. on cars at the smelters; that is to say, it was chargeable with the freight. The course of business under both contracts was for the buyer, after the net value of the ore had been determined by the assay and analysis and [fol. 179] other computations, to pay the freight on the contract value and deduct the amount in its return to the Mammoth Company. As I have stated, the plaintiff, in making his computations for purposes of evidence, divided the ore into three classes,—that actually shipped to Beer, Sondheimer & Company, at Bartlesville, there rejected and stored by the plaintiff's assignor; that produced

at the mine and there stored after repudiation and before the execution of the contract of resale; that produced and shipped directly to the United States Smelting Company after the contract of resale. All this rejected ore was eventually delivered to the United States Smelting Company under the contract of resale. The computations based upon these three divisions of the ore produced are contained in Plaintiff's Exhibits 16, 21 and 23, and to these exhibits are attached settlement sheets entitled "hypothetical damage sheets," showing the price with which Beer, Sondheimer & Company would have been chargeable under their contract if they had accepted delivery; and also settlement sheets with the United States Smelting Company containing similar data based upon the terms of the contract of resale. In the original hypothetical damage sheets, that is to say, the settlement sheets computed on the basis of the contract with Beer, Sondheimer & Company, the freight which would have been paid and deducted by Beer, Sondheimer & Company from the gross price to be paid to the Mammoth Company is computed according to the graduated tariff rate upon the contract price. As the advance, or additional price per ton, proportional to the advance in the market price of spelter was unrestricted under the Beer, Sondheimer & Company contract, and as spelter rose in [fol. 180] price enormously during what would have been the period of shipment to Beer, Sondheimer & Company had they accepted delivery, the "hypothetical" freight charges on those high valuations greatly exceed the freight charges estimated and paid under the same tariff by the United States Smelting Company upon the much lower valuations under the contract of resale. These lower valuations, as compared with those computed according to the original contract with Beer, Sondheimer & Company, were, in great part due to the fact that the additional price proportional to the advance in the market price of spelter was restricted in the contract of resale to an advance from five cents to eleven cents per pound. All the additional profit derived from the sale of spelter under the contract of resale when the price was above eleven cents a pound went to the Smelting Company.

The total amount of freight upon the rejected ore, estimated pursuant to the price under the Beer, Sondheimer & Company contract is	\$148,478.90
While under the United States Smelting Company contract the freight actually paid, estimated on the net value of the ore under the contract of resale was	106,277.40
Leaving a difference of	\$42,201.50

Before the master, the plaintiff claimed that the freight thus estimated in his original exhibits was an error; that the "actual value" must be taken as synonymous with market value; that if Beer, Sondheimer & Company had accepted delivery the rejected ore would [fol. 181] have been delivered to them substantially during the

period covered by the deliveries to the United States Smelting Company, though delivery would have begun two or three months earlier and would not have continued so long, and that during that period the market value of the ore for the purpose of applying the freight tariff must be deemed to have been identical with the price in the contract of resale, which was the best available price that the Mammoth Company could obtain after the breach by Beer, Sondheimer & Company. The plaintiff prepared and put in evidence computations based on this theory. Obviously, if the freight to be deducted from the total contract price under the Beer, Sondheimer & Company contract is to be taken according to the prices of that contract at \$148,478.90, instead of at \$106,277.40, the amount estimated and actually paid pursuant to the prices of the contract of resale, the damages, that is to say, the difference between the price received under the contract of resale and the price Beer, Sondheimer & Company should have paid, will be \$42,201.50 less than if the freight to be estimated under both contracts is the amount paid under the contract of resale.

I have already stated the market conditions affecting the saleability of zinc sulphide ores during the period subsequent to the repudiation of their contract by Beer, Sondheimer & Company.

The phrase "actual value" in the official railroad tariffs, used with reference to special "commodity rates," graduated according to value, presumably does mean, as plaintiff argues, though within flexible limits, a value determined by the established market price of the merchandise from time to time, and is intended to protect the carrier from exaggerated claims in the case of loss on the one hand, and, on the other, from unjustifiably low values directed to an evasion of the higher rates. But when there was no general market and no established market price at all for the consigned merchandise; when the only obtainable price was an arbitrary one uninfluenced by competition, depending in each case on the operating conditions existing at the particular smelter to which a sale could be made, how is the actual value to be determined? Obviously, the question must be settled in actual practice by some practical rule in a general way just to all the parties concerned. It would be preposterous to suppose, considering the enormous mass of such transactions, that before the freight could be ascertained under such a tariff there should be a minute inquiry to determine whether or not there was an established market price for the commodity transported.

In the great mass of cases, undoubtedly, the rate upon merchandise moved under such special "commodity rates" is estimated on the value established by the invoice or contract price agreed upon between the shipper and consignee. Usually, this will adequately reflect the general market price, if there is one, or if there is not, will be fairly conclusive evidence of what in the judgment of the parties, who may be presumed to know best, the actual value of the consignment is. If during the period of performance of the contract of resale in this case, that is to say, between July, 1915, and February, 1916, when there was no pretense of a general market or established market price for zinc ore, Beer, Sondheimer & Company had been

accepting deliveries and paying freight on the net contract price of the shipments pursuant to the terms of their own contract, just as [fol. 183] they had done prior to April, 1915, they could not have claimed against the carrier that the contract price which they were paying to the shipper did not represent the "actual value" of the merchandise merely because in the prevailing market conditions other smelters, not tied up by contracts made before the great rise in spelter began, were able to compel shippers to take a much lower price than the actual commercial value of the ore in fact was in view of its metallic content and the high current price of spelter. It cannot be doubted in my opinion, that the hypothesis of acceptance by Beer, Sondheimer & Company, assumed for the purpose of determining the amount of their obligation for the rejected ore under their own contract, must, in justice, include the further assumption that they would have paid freight, and have been bound to pay it, according to their own contract prices, and would have deducted it when so paid from the gross price of the shipments in each case. This seems to me to answer plaintiff's argument that to allow the freight deduction on the Beer, Sondheimer side of the problem to be computed on their contract prices would be a violation of the provisions of the Interstate Commerce Act prohibiting discrimination. I have not overlooked that argument, but do not agree with it.

Interest

The plaintiff claims interest upon the difference between the contract price of each shipment of ore, as computed under the contract with Beer, Sondheimer & Company, and the price actually paid by [fol. 184] the United States Smelting Company under the contract of resale.

The plaintiff's computations are shown in exhibits 124, 125 and 126. I take the following statement of the method and result of the plaintiff's computation from the plaintiff's brief:

"He took the dates of payment by Beer, Sondheimer and Company for the shipments of ore which they accepted and paid for, and ascertained the further time after date of shipment which it took them to make payment for these lots of ore. This he found to be sixty-one days (Plaintiff's Exhibit 125). He then took the amount that Beer, Sondheimer & Company would have paid for each of the lots of ore involved in this suit and computed interest on these amounts for a period of sixty-one days after the date when these lots would have been shipped to Beer, Sondheimer & Company under its contract. He then took the dates on which payment was made by the United States Smelting Company to the Mammoth Copper Mining Company for the lots involved in this suit, and calculated interest which could have been earned on the money so paid up to April 1, 1920. From the amount of interest calculated to be due from Beer, Sondheimer & Company on the total payment due from it he then subtracted the amount earnable on the actual amount paid by the United States Smelting Company, obtaining as a result the net

amount of interest due on the items of damage up to April 1, 1920. This is \$77,466.58."

[fol. 185] In view of my conclusion that interest cannot be allowed at all under the authorities, I have not critically examined the computations of interest in Plaintiff's Exhibit 126, and they may require some revision if interest is finally allowed.

The defendants oppose the allowance of interest on two grounds—

(1) That the claim is for unliquidated damages, the amount of which was unknown to and unascertainable by the defendants.

(2) That if interest is recoverable at all, it can only be for a period prior to the commencement of war between the United States and Germany, because the members of Beer, Sondheimer & Company were citizens and residents of Germany at the outbreak of the war and during the war, and still are such citizens and residents; while, technically, the state of war between Germany and the United States still continues.

I do not think any interest can be allowed in this case with due regard to the judicial rules controlling the allowance of interest on recoveries on claims for unliquidated damages.

The federal courts in this circuit have repeatedly decided that on the question of allowing interest in such cases they will follow the rules established in the state tribunals (*Stephens vs. Phoenix Bridge Co.*, 139 Fed., 248, 250; *Robinson vs. United States*, 251 Fed., 461, 469; *Demotte vs. Whybrow*, 283 Fed. 366).

The New York rule has been frequently stated and applied not only in actions on contracts for work and labor, but, also in those [fol. 186] arising on executory contracts for sale. It is the familiar rule considered in *Van Rensselaer vs. Jewett*, 2 N. Y., 135, repeated and explained by Judge Selden in *McMahon vs. N. Y. & Erie R. R. Co.*, 20 N. Y., 469, as holding that in such actions interest will be allowed upon an unliquidated demand the amount of which can be ascertained by computation together with a reference to well established market values, because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay.

In *Sloan vs. Baird*, 162 N. Y., 327, the Court of Appeals after citing *Mansfield vs. N. Y. C. & H. R. R.*, 114 N. Y., 331, *White vs. Miller*, 78 N. Y., 393, and *Gray vs. Central R. R. Co. of N. J.*, 157 N. Y., 483, said (page 329):

"The rule as stated in these cases is to the effect that in an action to recover unliquidated damages for the breach of a contract, interest is not allowable unless there is an established market value of the property, or means accessible to the parties sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled. The damages in this case were the difference between the amount which the plaintiff agreed to pay and the value of the property."

As to market value the Court said (page 330):

"The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great [fol. 187] an extent and in so many instances that the value becomes fixed."

The latest statement in *New York* is in *Fabor vs. City of New York*, 222 N. Y., 255, 262, in which the Court said:

"The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values or other generally recognized standards?"

It will be observed that the statement of the rule in all the cases is that the means of ascertaining the damages must be accessible to the parties "to be charged,"—that is, to the defendant.

The uncertainties which, in this case, made it quite impossible for Beer, Sondheimer & Company, after the repudiation of the contract, to ascertain the damages by any "means accessible to them" were, as I understand the meaning of those words in the authorities, inherent in the terms of the contracts. In both contracts, the contract price which it was essential for the defendants to know in order to compute the damages, depended upon—

(1) The quantity of ore produced.

(2) The metallic content of the ore as determined for each shipment, after delivery, by the assay and analysis.

[fol. 188] (3) The market price of spelter.

(4) Terms of resale contract.

No. 3. The market price of spelter, could always be ascertained, but after the repudiation of the contract it was impossible for Beer, Sondheimer & Company to ascertain "by any means accessible to them" either the quantity produced or its metallic content, or the terms of the contract of resale. While the evidence shows that they were notified by the plaintiff's assignor at an early date after the threatened repudiation of the contract, that if they continued to refuse deliveries the Mammoth Company would sell the ore for the best price obtainable and hold them for the damages, there is no evidence at all that Beer, Sondheimer & Company were kept informed of the ore produced, the quantity shipped to the United States Smelting Company under the contract of resale, the results of the assays and analyses of the ore, or the terms of the contract of resale.

I have already found that the evidence fails to disclose any general established market price for zinc ore during the life of the contracts, and even if there had been such an established price it is difficult to see how Beer, Sondheimer & Company could have known, from any source of information accessible to them, the analysis of

each shipment under the contract of resale to the United States Smelting Company knowledge quite essential to any approximate computation of plaintiff's damages. The plaintiff says the defendants Beer, Sondheimer & Company must have known what price could be obtained for 33% zinc ore during 1915. Assuming that to be true, though it is only an assumption, how would that have [fol. 189] helped them to compute with even a rough approximation to accuracy the value of each of plaintiff's shipments under the contract of resale? To make such a computation it was necessary to know the metallic content of each shipment. The possible variation downwards in price under the Beer, Sondheimer & Company contract between 40% and 33% zinc was seven dollars per ton, and under the contract of resale fourteen dollars per ton. The variation upwards above 40% was one dollar per ton under the original contract and \$1.50 per ton under the contract of resale and unrestricted.

The plaintiff argues that the rule as to interest is satisfied because, when the quantity produced and its metallic content had been actually ascertained, the determination of damages was a matter of computation with reference to the readily ascertainable market price of spelter. If the rule has any meaning at all, it means what it says—that the necessary facts must be ascertainable by the party to be charged from data accessible to him. I do not know of any authority for the position, apparently taken by the plaintiff, that the defaulting party is chargeable with interest if he might have obtained information upon which he could have computed approximately the amount of the damages by application to the injured party. That would virtually abolish the rule refusing interest on unliquidated damages.

There is a difference, it is true, between the uncertainties arising from the peculiar character of the contract in this case, and those that arise in cases in which the damages must eventually be assessed by a court or jury on conflicting evidence. In this case the damages were, [fol. 190] in fact, a matter of computation when the result of the assays and analyses, the quantity shipped and the terms of the contract of resale had been ascertained, but information on these points was quite as much beyond the power of the defendants to ascertain by means accessible to them, or in any way, except by information from the Mammoth Company or the United States Smelting Company, as in a case where damages for the breach would have to be determined by a jury.

The plaintiff argues, also, that in a contract of sale where the seller has resold the subject of the sale for the account of the buyer, and sues to recover the difference between the amount realized on the sale and the contract price, the recovery will also carry interest by force of some special general rule of law to that effect. This is based on certain dicta in *Gray vs. Central R. R. of N. J.*, 157 N. Y., 483, 488. That action was brought to recover damages for the refusal of the defendant to accept and pay for a ferryboat which was the subject of the sale. Apparently the plaintiff retained the boat as his own (at least that was the theory of the complaint), and sued the buyer for damages for refusal to accept delivery. After considering

most of the preceding authorities and deciding in affirmance of the judgment below that the damages were unliquidated and that interest should not be allowed, Judge Gray, writing the opinion of the court, said (page 488):

"Nor can it be said that adherence to the rule is prejudicial to the rights of those who are situated as were the plaintiffs here. When the defendant refused to perform its contract, the plaintiffs [fol. 191] could have brought an action against it to recover the contract price of the vessel; in which case a recovery by them would carry interest. Or they could have sold the vessel for the account of the defendant, and have brought an action to recover the difference between the amount realized upon the sale and the contract price; in which case a recovery would, also, carry interest. What the plaintiffs did, however, instead of adopting either one of these courses, was to retain the property as their own, and to bring this action for the damages sustained by the refusal of the defendant to perform its contract."

These statements, especially the second, must, of course, be read in a sense consistent with the decision the Court had just made. The first proposition is undoubtedly of general application. No such absolute application, however, can be given to the second proposition. I think it must be assumed that in making this statement the Court did not intend to assert any absolute general rule inconsistent with the rule disallowing interest on unliquidated damages which it had just applied so emphatically, but had in mind the ordinary case of an executory contract of sale in which the quantity and price are both completely stated, and of a resale the particulars of which are known to the defendant either by notice and attendance at the sale, or by information from the seller, and meant that in such a case interest would be allowed on the recovery computed from the time of the liquidation of the damages by the resale, or from the date of the breach, as the facts might justify. Contracts constantly arise in [fol. 192] respect to which the general rules relating to damages and the recovery of interest cannot be applied without modification. This was such a contract, because neither the quantity to be paid for, nor the elements essential to the determination of the price, could be ascertained from the face of the contract, but required possession of the product and a subsequent chemical analysis. Knowledge of the terms of the contract of resale was also necessary to enable any computation of the damages to be made with approximate accuracy.

To plaintiff's argument that if defendants were without the information necessary to enable them to ascertain the plaintiff's damages with sufficient accuracy to make a tender, their ignorance was the result of their deliberate repudiation of the contract, and that it would be highly unjust to relieve them from interest which the plaintiff would concededly have been entitled to recover in an action for the contract price,—an apt answer is given in a recent distinguished work on contracts—

"The disinclination to allow interest on claims of uncertain amount seems based on practice rather than theoretical grounds" (2 Williston on Contracts, Sec. 1413).

The New York rule has obviously little logical basis. It simply marks the limit to which the courts have consented to go beyond the much more restricted limitation of the common law. With quite equal logic they might have gone farther, or they might not have gone so far.

If the foregoing views on the question of interest are correct, it is unnecessary to consider the argument of the defendants,—that no [fol. 193] interest can be allowed since the commencement of the war between the United States and Germany because the parties to the original contract were respectively citizens and residents of opposing belligerents. The general rule that in such cases interest is suspended pending the war, is not disputed. The plaintiff argues, however, that the rule is inapplicable to this case because during the whole period of the war the defendant, Beer, Sondheimer & Company were represented in this country, up to the time that their property was taken over by the Alien Property Custodian, by agents with full authority and ample funds to satisfy the plaintiff's claims. If this agency is proved, the case may be taken out of the established rule applicable to interest under contracts between citizens of opposing belligerents. The only evidence on the point to which the master has been referred, consists of some statements in an official report to the President by the Alien Property Custodian of his official proceedings during the year 1918 (Plaintiff's Exhibit 62, page 94). That report contains a long chapter entitled "The Metal Situation," and reviews at length the growth and existing conditions of metal industries in Germany. A section headed—"Disclosures by Investigations Conducted by Alien Property Custodian" deals with the activities of Beer, Sondheimer & Company and their local agents in the United States. If the statements about Beer, Sondheimer & Company in this report are to be taken as evidence of the facts narrated, they tend strongly to establish the plaintiff's assertion of an authorized local agency by Beer, Sondheimer & Company, but I have great doubt of the competency of this evidence. Obviously, if Beer, Sondheimer & Company could have appeared to [fol. 194] defend this action, and had done so, such evidence would not have been admissible against them. The report was introduced on the trial of the action, preceding the interlocutory decree, and though the defendants' counsel did not object to it formally, he remarked that he could not see how it could be relevant (Trial Minutes, page 17). If it were necessary to consider this objection to the allowance of interest, my opinion would be against receiving this narrative in the report of the Alien Property Custodian as evidence of the existence of such an agency, but in view of the conclusion that interest should be disallowed under the authorities hereinbefore considered, it seems unnecessary for me to decide the point. Counsel for plaintiff said, in offering the report (Trial Minutes, pages 17-18):

"The object is to prove that the Alien Property Custodian has considered the stock of Beer, Sondheimer & Company, Incorporated, as the property of the partners which formerly constituted the partnership firm of Beer, Sondheimer & Company."

On the point of authorized agency, plaintiff now seeks to use the report as in some sense an admission against interest by Beer, Sondheimer & Company made by the Alien Property Custodian on their behalf.

By consent of the parties, the exhibits introduced before the master including those introduced on the depositions (enumerated at the beginning of Vol. I of the minutes) have been left in the custody of the parties. Exhibits introduced and filed during the trial in court, papers and depositions received by the master from the office [fol. 195] of the clerk of the court are returned herewith. Such exhibits are 1, 3, 8, 31; 50-98 both inclusive; and Defendants' Exhibits marked alphabetically D-Z, both inclusive, and A1.

I return herewith all the testimony taken before me (Vol. 1, pages 1-377; Vol. 2, pages 378-649); also the testimony taken on the trial.

Schedule of Depositions Taken on Behalf of the Plaintiff Returned with the Master's Report

(1) Depositions taken at Salt Lake City, Utah (in one volume): W. H. Corder, G. W. Cushing, George W. Heintz, V. B. Hjortsberg, Herbert Salinger.

(2) Deposition of Frederick Lyon, taken in New York City.

(3) Depositions taken at Kansas City, Mo. (in one volume): Louis A. Bainter, Noel B. Boulware, Arthur E. Curtis, F. H. Dodd, O. O. Mitchem, Melvin N. Moritz, George H. Rankin.

[fol. 196] (4) Depositions taken at San Francisco, Cal. (in one volume): John C. Rix, O. W. Barr, William H. Hubbard, R. W. Buick, J. W. Hodge, A. P. Anderson, James A. Leslie, Otto J. Maritz.

(5) Deposition of Carl M. Ball, taken in New York City.

(6) Deposition of Edwin Anderson, taken in Denver, Col.

(7) Deposition of George L. Olmstead, taken in New York City.

(8) Deposition of W. L. Renner, taken in New York City.

(9) Deposition of George Blow, taken in New York City.

Affidavits and Stipulations

I also return herewith as part of the evidence before me certain affidavits made in San Francisco, Cal., which, by stipulation between the parties, were received as the depositions of the affiants, together [fol. 197] with the stipulations: Roy W. Buick, Otto J. Maritz,

M. B. Kindleberger, William H. Hubbard, Gus Ray, James W. Hodge, James A. Leslie, J. H. French (made in W. Va.).

The master requests the court to fix his compensation and the expenses of the stenographer, and a certificate of the services rendered is filed herewith.

All of which is respectfully submitted.

Dated, New York, March 30, 1921.

(Sd.) Wallace MacFarlane, Special Master.

[fol. 198] DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

Plaintiff herein excepts to the report of Wallace Macfarlane, Esq., the Special Master, filed in this cause on the 30th day of March, 1921, on the following grounds:

I. The Master has in said report stated and certified that the plaintiff is not entitled to recover interest upon the amount of his claim against the defendant herein, whereas the Master ought to have found that the plaintiff was entitled to recover interest on the amount due on each shipment of ore from a date sixty-one days after the date of shipment of each lot of the ore included in the plaintiff's claim, as more fully set forth in Plaintiff's Exhibits 124, 125 and 126.

II. The Master has in said report stated and certified that in com-[fol. 199] puting the amount of the plaintiff's damage by reason of the defendants' breach of contract, there should be taken into consideration the difference between the amount of freight which the plaintiff's assignor actually paid for freight upon the resale of the ore and the sum which it is estimated the freight charges would have amounted to if the contract sued on had been performed, computed upon the basis of the price which the plaintiff's assignor was to receive for said ore under the terms of the Beer-Sondheimer contract, whereas the Master ought to have found that neither the freight actually paid by the plaintiff's assignor nor the amount which it is estimated would have been paid in the due performance of the contract with Beer, Sondheimer & Co., should be taken into consideration in ascertaining the amount of the plaintiff's damages.

Yours, etc., Charles W. Stockton, Solicitor for Plaintiff, 51
Broadway, New York City, N. Y.

To Francis G. Caffey, Esq., Solicitor for Defendants, Francis P. Garvan, John Burke. Wallace MacFarlane, 26 Liberty Street, New York City, N. Y.

[fol. 200] DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

DEFENDANTS' EXCEPTION TO MASTER'S REPORT

The above-named defendants, Francis P. Garvan as Alien Property Custodian and John Burke as Treasurer of the United States of America, hereby except to the report of Wallace Macfarlane, Esq., the Special Master, filed in this cause on the 30th day of March, 1921, on the following grounds and in the following respects:

I. The Master therein finds and reports that the plaintiff has suffered damages in the sum of Two hundred fifty-nine thousand, five hundred ninety-seven and 21/100 Dollars (\$259,597.21) by reason of the failure and refusal of the defendants, Beer, Sondheimer & Company, to receive, accept and pay for the ore therein referred to, whereas the Master should have found and reported that the plaintiff had failed to establish any damages whatsoever.

[fol. 201] II. The Master therein finds and reports that in the dealings between the Mammoth Copper Mining Company and the United States Smelting Company in regard to the ore in question, the said companies dealt as separate and independent legal entities, and are to be so considered for the purpose of this litigation; and that the transaction between said companies evidenced by three certain letters from W. H. Eardley to C. W. Metcalf, dated respectively July 21, 1915, March 8, 1916 and March 20, 1916, was a valid contract of sale of the ore in question by the Mammoth Copper Mining Company to the United States Smelting Company, and was entered into in good faith; whereas the Master should have found and reported that in such dealings the said corporations did not act, and should not be regarded, as separate and independent legal entities but as agent directed and controlled by a common principal, to wit, the Holding Company, and that the said transaction was not therefore a real sale or contract of sale.

III. The Master therein finds and reports that the damages suffered by the plaintiff are measured by the difference between the amount which Beer, Sondheimer & Company would have paid under their contract and the amount paid by the United States Smelting Company pursuant to the so-called contract of resale (less freight in each case) without taking into account profits realized upon the ultimate disposition of the metals recovered from the ore [fol. 202] whereas the Master should have taken such profits into consideration in reduction of the damages.

Dated, New York, April 11, 1921.

Yours, etc., Francis G. Caffey, United States Attorney, Southern District of New York, Solicitor for Defendants Garvan and Burke, Post Office Building, New York, N. Y.

To Charles W. Stockton, Esq., Solicitor for Plaintiff, 51 Broadway, New York, N. Y.; Wallace MacFarlane, Esq., Special Master, 26 Liberty Street, New York, N. Y.

[fol. 203] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO SUSTAIN DEFENDANTS' EXCEPTIONS TO
MASTER'S REPORT

SIR:

Please take notice, that upon the report of Wallace Macfarlane, Special Master, filed herein on the 30th day of March, 1921, and the defendants' bill of exceptions to said report filed herein on the 12th day of April, 1921, I will move this court at a stated term thereof to be held in the Post Office Building, Park Row and Broadway in the Borough of Manhattan, City of New York, on the 15th day of April, 1921, at 10 A. M., or as soon thereafter as counsel can be heard for an order sustaining the defendants' exceptions to said report, and for such other and further relief in the premises as the Court may deem just and proper.

Dated, New York, April 12, 1921.

Yours, etc., Francis G. Caffey, United States Attorney, Southern District of New York, Solicitor for Defendants Garvan and Burke, Post Office Building, New York, N. Y.

[fol. 204] To Charles W. Stockton, Esq., Solicitor for Plaintiff, 51 Broadway, New York, N. Y.; Wallace MacFarlane, Esq., Special Master, 26 Liberty Street, New York, N. Y.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTION FOR PERMISSION TO ENTER SUPPLEMENTAL BILL

SIR:

Please take notice that upon the annexed affidavit of Frederick [fol. 205] Y. Robertson, verified the 11th day of April, 1921, I will move this court at a stated term thereof, to be held in the Post Office Building, Park Row and Broadway, in the Borough of Manhattan, City of New York, on the 15th day of April, 1921, at 10 A. M., or as soon thereafter as counsel can be heard, for permission to file a supplemental bill in the above cause upon the grounds therein stated.

New York, April 11, 1921.

Yours, etc., Charles W. Stockton, Solicitor for Plaintiff, 51 Broadway, New York City, N. Y.

To Francis G. Caffey, Solicitor for Defendants, Francis P. Garvan, John Burke.

[fol. 206] DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT READ IN SUPPORT OF MOTION TO FILE SUPPLEMENTAL
BILL

STATE OF NEW YORK,
County of New York, ss:

Frederick Y. Robertson, being duly sworn, deposes and says that on the 26th day of November, 1918, he filed a bill in this honorable court against Francis P. Garvan as Alien Property Custodian, John Burke as Treasurer of the United States of America; Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Co., for the purpose of proving a debt due from said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name of Beer, Sondheimer & Co., under Section 9 of the Trading with the Enemy Act, and plaintiff prayed in said bill to order de-[fol. 207] livery by the defendants Francis P. Garvan, Alien Property Custodian, and John Burke, Treasurer of the United States of America, so much of the property of the said Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name of Beer, Sondheimer & Co., as might be necessary to satisfy the debt claimed by the plaintiff against said defendants with interest thereon and the costs of this action.

The defendants, Francis P. Garvan, Alien Property Custodian, and John Burke, Treasurer of the United States of America, appeared and answered the said bill, and a trial was had herein in June, 1920, before Hon. Augustus N. Hand at which an interlocutory decree was entered in favor of the plaintiff herein, and the case was referred to the Honorable Wallace Macfarlane, as Special Master, to ascertain the damages due by reason of the defendants' breach of contract.

Upon argument before said Honorable Wallace Macfarlane, defendants' counsel assumed the position that the court could not enter a decree for an amount larger than that prayed in the original notice of claim filed with the Alien Property Custodian. Plaintiff's original claim filed with the Alien Property Custodian on October 31, 1918, was for the amount of \$272,824.88; on March 11, 1921, plaintiff filed with the Alien Property Custodian an amended claim, altering the amount claimed by the plaintiff from defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners, doing business under the firm name of Beer, Sondheimer & Co., to the sum of \$302,000.

[fol. 208] Wherefore your petitioner is advised that it is necessary to allege and prove that on March 11, 1921, the plaintiff herein filed

an amended claim with the Alien Property Custodian of the United States in the sum of \$302,000, and that the amount demanded be amended to \$301,698.78, and your petitioner prays that relief be granted to file a supplemental bill against the defendants above named for the purpose of setting forth such allegations, and for such general and special relief as may be proper.

Frederick Y. Robertson.

Sworn to before me this 11th day of April, 1921. E. R. Whittingham, Notary Public, New York County. New York Co. Clerk's No. 90. New York Co. Register's No. 2093. Commission expires March 30, 1922.

[fol. 209] DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

OPPOSING AFFIDAVIT

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Harland B. Tibbetts, being duly sworn, deposes and says:

I am an attorney at law and am of counsel for the defendants Garvan and Burke in this action. I have been personally familiar with the proceedings herein from its early stages.

This affidavit is made in opposition to the plaintiff's motion for permission to file a supplemental bill in this cause, that motion being based upon an affidavit made by the plaintiff, verified April 11th, 1921. Therein at page two appears the following statement:

"On March 11, 1921, plaintiff filed with the Alien Property Custodian an amended claim, altering the amount claimed by the plaintiff from defendants, Nathan Sondheimer, Albert Sondheimer, Leo [fol. 210] Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name of Beer, Sondheimer & Co., to the sum of \$302,000."

I am informed and believe that the facts are that on or about March 11th, 1921, the plaintiff filed with the Alien Property Custodian an instrument wherein he stated that he desired to amend the claim theretofore filed with the Custodian. This instrument was not accepted by the Custodian as an amended claim but as a new and independent notice of claim. Under date of April 14, 1921, I am informed and believe that the Alien Property Custodian addressed to the plaintiff a communication as follows:

"With reference to your communication of March 9, 1921, enclosing an instrument identified by you as an amendment to the claim

heretofore filed by you against Beer, Sondheimer & Company under date of October 31, 1918, you are advised in connection therewith that in view of the pending litigation and the proceedings already had herein the proposed amendment dated March 9, 1921, cannot be accepted as an amendment to the original claim of October 31, 1918. The same may, however, be filed in this office under the provisions of Section 9 as a notice of claim independent of the original claim concerning which, however, we shall make no notation of filing until receipt of further word."

The sources of my information and the grounds of my belief as [fol. 211] to the above statements are written communications received from the Alien Property Custodian's office in Washington, D. C. Corroborative affidavits will be supplied if desired by the Court, but I anticipate that the facts above stated will not be disputed.

Harland B. Tibbetts.

Sworn to before me this 27th day of April, 1921. M. Rosalie Maser, Notary Public. New York County Clerk's No. 327. New York County Register's No. 3104. Commission expires March 30, 1923.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER CONFIRMING MASTER'S REPORT

Upon reading and filing the report of Wallace Macfarlane, Special Master, filed herein March 30th, 1921, and the plaintiff's bill [fol. 212] of exceptions to said report filed herein April 6th, 1921, and the defendant's bill of exceptions to said report filed herein April 11th, 1921, and upon all the pleadings and proceedings had herein, and after hearing Kenneth E. Stockton, Esq., in support of the plaintiff's exceptions, and William Travers Jerome, Esq., and Harland B. Tibbetts, Esq., in support of the defendants' exceptions to said report, it is

Ordered that the report of Wallace Macfarlane, Special Master, herein filed the 30th day of March, 1921, be and the same hereby is in all respects approved and confirmed and

Further ordered the plaintiff's exceptions to said report are hereby overruled, provided, however, that interest shall be allowed upon the amount of the plaintiff's claim as found by the Special Master herein from the 3rd day of July, 1919, and

Further ordered that the defendants' exceptions to the Master's report filed April 11th, 1921, are hereby overruled, and

Further ordered that the compensation of Wallace Macfarlane, Special Master herein, is hereby fixed at Six thousand Dollars (\$6,000), and the bill of Christopher Reckleff, for stenographic services in the sum of Eighty-five Dollars (\$85.00) is hereby approved, and that said sums of Six thousand Dollars (\$6,000) and Eighty-five Dollars (\$85.00) shall be taxable as costs in addition to the usual disbursements.

Dated, New York, July 25, 1921.

Augustus N. Hand, U. S. D. J.

[fol. 213] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

OPINION

Stockton & Stockton, Attorneys for Plaintiff, Charles W. Stockton, Kenneth E. Stockton and Alfred Sutro, Counsel.

Jerome, Rand & Kresel, Attorneys for Defendants, William Travers Jerome and Harland B. Tibbetts, Counsel.

AUGUSTUS N. HAND, District Judge:

I can add nothing to the careful report of the Special Master. Indeed, I have had little trouble with any of his findings except as to the question whether interest should be allowed and the freight rate. "Actual value," I think must mean contract price so far as the freight rate is concerned where no market value is ascertainable. It would be impracticable for the carrier to go into elaborate investigations based upon the best terms a shipper could obtain from a purchaser in [fol. 214] cases where there was no standard price and there was a contract price. The contract price was adopted by the railroad without question when the Mammoth Copper Mining Company shipped to its vendee and there is no reason to believe that this price would not have been an acceptable and lawful basis for freight rates if the contract had been performed.

As for interest it would be awarded, if at all, as damages. There are certain decisions holding that the *lex fori* governs in such a case. *Goddard vs. Foster*, 17 Wall., 123; *Mather vs. Stokely*, 218 Fed., 764. If this rule were adopted I see no reason to suppose that interest would be allowed. *Stephens vs. Phoenix Bridge Co.*, 139 Fed., 248; *Gray vs. Central R. R. of New Jersey*, 157 N. Y., 483; *Faber vs. City of New York*, 222 N. Y., 256. The foregoing cases hold that where damage cannot be ascertained by the defendant with reasonable certainty, interest does not follow. The weight of authority, however, would seem to indicate that even where interest is allowed as damages, the law of the place of performance is controlling. The contract says nothing about the place of payment, but subsequent to making the con-

tract the parties arranged that payment should be made at Boston, Massachusetts. The Massachusetts courts apparently would not allow interest in a case where the amount due from the defendant can not be calculated with reasonable certainty. Palmer vs. Stockwell, 75 Mass., 237, at least prior to the beginning of the suit.

Inasmuch as the contract was signed in Utah by the General Manager of the Mammoth Copper Mining Company "subject to approval," and was approved in California, and California was the [fol. 215] place where the zinc crude ore of the Mammoth Copper Mining Company was to be produced and shipped, it may well be contended that that was the place where payments in the absence of some special agreement to the contrary were to be made. The Civil Code of California, §3287, and the case of Coburn vs. Goodall, 72 Cal., 498, indicate that damages like those here involved, which were not capable of being made certain by calculation, do not bear interest. The mere signing of the agreement in Utah "subject to approval," and the provision therein that all notices required to be given in the contract should be deemed to be sufficiently served if addressed to the seller at Salt Lake City, Utah, do not seem to me to make Utah the place either of the execution or performance of the contract. Moreover, the cases of Wilson vs. Salt Lake City, 174 Pac. Rep., 847; Fell vs. Union Pacific Ry., 32 Utah, 101, and Kimball vs. Salt Lake City, 32 Utah, 253, are all cases where market value was involved and there could be calculations based upon it. Here the master has certified that there was no ascertainable market value for the product, and it is indisputable that the defendant did not have the data at its command from which the purchase price of the ore by the United States Smelting Company could be ascertained. The decisions of the Utah Courts while adopting a liberal view in allowing interest seem to have gone no farther than the recent New York decisions. The Statute of Oklahoma as to interest upon damages resembles that of California, and provides that "any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon [fol. 216] from that day * * *" (1910 Rev. Laws, Okla., 2848, Chap. 24, Art. 1).

I think the decisions of the different states which I have referred to do not differ as greatly as plaintiff's counsel suppose. I doubt whether in any of them interest would be allowed at law where there is no market value which can be referred to as a standard, and the question before the court is not only how much less than the contract price the seller realized from the product which the buyer would not accept, but the further question here involved whether the buyer acted in good faith and the court had reason to believe the seller did what he could to realize a fair price and mitigate damages. All sorts of legal theories can be evolved from the cases as to what law is applicable in determining whether interest should be paid, and what rate. As a matter of strict principle it would seem that where interest is paid, not according to the terms of the contract, but as damages, the law of the forum should govern. The weight of

authority, as I have said, is probably against this doctrine where the place of performance has been designated by the parties in their contract. But in the contract before us, the place where the ore is to be delivered was "Bartlesville, Oklahoma, or at such other works as may be designated by the buyer." There is also no place of payment designated. Under these circumstances the Supreme Court in the case of *Goddard vs. Foster*, 17 Wall., at page 143, held that where no rate was fixed in the contract, and no place designated for its performance, the "rule of the *lex fori*" would obtain. Under the settled rule in this district no interest can be allowed at law. *Stephens vs. Phoenix Bridge Co.*, 139 Fed., 248. I might be inclined to allow [fol. 217] interest as is within the discretion of a court of chancery (*Pennsylvania Steel Co. vs. New York City Ry. Co.*, 198 Fed., 778; *Woerz vs. Schumacher*, 161 N. Y., 536) were it not for the fact that for long prior to the institution of this proceeding, or the filing of the claim with the Alien Property Custodian, there had been a state of war between this country and Germany, whereof the defendants, Beer, Sondheimer & Co., were citizens and subjects. During that period interest was under the authorities suspended. (*Standard Silver Mining Co. vs. Garvan*—unreported decision by Judge Rudkin, of February, 1921; *Insurance Company vs. Davis*, 95 U. S., 425).

Under the circumstances, I am inclined to adhere to the New York rule and not allow interest.

The application to file a second amended bill of complaint increasing the amount of damages claimed is granted, and the complaint may be regarded as amended accordingly. The only change is in the amount of damages asked for, which is an amendment that is frequently allowed at the trial. The whole matter of the deduction of an additional amount of estimated freight was discussed by the master, and has been passed on by me, so that the amendment has no effect except possibly to protect the rights of the plaintiff on appeal.

The exceptions are overruled, and the report is confirmed. The compensation for services and stenographer's fees asked for by the master is granted.

A. N. H., D. J. July 16, 1921.

[fol. 218] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER OF SUBSTITUTION

Upon reading and filing the annexed consent and upon motion of William Hayward, United States Attorney for the Southern District of New York, Proctor for Francis P. Garvan as Alien Property Custodian,

todian, and John Burke as Treasurer of the United States of America, it is

Ordered that Thomas W. Miller as Alien Property Custodian, be substituted as a defendant herein in place and stead of the defendant Francis P. Garvan, sued as Alien Property Custodian, and that Frank White, as Treasurer of the United States of America be substituted as a defendant herein in place and stead of the defendant John Burke, sued as the Treasurer of the United States of America.

Dated, July 22, 1921.

A. Hand, United States District Judge.

[fol. 219] Entry of the foregoing order is hereby consented to without further notice.

Dated, New York, July 22, 1921.

Charles W. Stockton, Solicitor for Plaintiff. William Hayward, Solicitor for Defendants Garvan and Burke, By Harland B. Tibbetts, of Counsel.

AT THE JULY TERM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT, HELD AT THE UNITED STATES DISTRICT COURT ROOMS, AT 233 BROADWAY, IN THE BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 25TH DAY OF JULY, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-ONE.

Present: Honorable Augustus N. Hand, District Judge.

[Title omitted]

FINAL DECREE

This cause came on to be heard at this term and was argued by counsel and thereupon upon further consideration thereof it was [fol. 220] Ordered, Adjudged and Decreed as follows:

That the complainant do recover of the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, the damages resulting from the defendants' breach of contract in the sum of Two hundred fifty-nine thousand five hundred ninety-seven Dollars and twenty-one cents (\$259,597.21), together with the costs, charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed that the defendants Thomas W. Miller as Alien Property Custodian and Frank White, as Treasurer of the United States of America pay over to the plaintiff from the property and money of said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, held by said Thomas W. Miller as Alien Property Custodian, and Frank White as Treasurer of the United States of America, the sum of Two hundred fifty-nine thousand five hundred

ninety-seven Dollars and twenty-one cents (\$259,597.21) with interest thereon from July 3, 1919, in the sum of Thirty-one thousand eight hundred dollars and sixty cents (\$31,800.60), together with the plaintiff's costs charges and disbursements herein as taxed, at Eight thousand four hundred ninety-nine Dollars; nine cents (\$8,499.09), within ninety days after the entry of this order.

Augustus N. Hand, U. S. D. J.

[fol. 221] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

E. 15-320

FREDERICK Y. ROBERTSON, Plaintiff,
against

THOMAS W. MILLER, as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States of America; Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and Emil Beer, Copartners, Doing Business under the Firm Name and Style of Beer, Sondheimer & Company, Defendants.

PETITION FOR APPEAL BY DEFENDANTS

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, acting under the direction of the Attorney General of the United States, believing themselves to be aggrieved by the interlocutory decree entered herein on or about the 20th day of July, [fol. 222] 1920, adjudging that the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, breached the contract in suit and ordering that the complainant recover of said defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, the damages resulting from said breach, and referring the matter to Wallace Macfarlane, Esq., to ascertain, take, state and report to the Court the amount of damages suffered by the plaintiff, and believing themselves aggrieved by the order entered herein on the 25th day of July, 1921, confirming the Master's report and overruling the defendants' objections thereto, and by the final decree entered herein on the 25th day of July, 1921, adjudging that the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, pay over to the plaintiff from the property and money of the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, held by said Thomas W. Miller, as Alien Property Custodian, and Frank White,

as Treasurer of the United States of America, the sum of Two hundred fifty-nine thousand five hundred ninety-seven dollars and twenty-one cents (\$259,597.21) with interest thereon from July 3, 1919, in the sum of Thirty-one thousand eight hundred dollars and sixty cents (\$31,800.60), together with the plaintiff's costs, charges and disbursements herein as taxed, at Eight thousand four hundred ninety-nine dollars and nine cents (\$8,499.09), within ninety days after the entry of said order; and your petitioners respectfully show that in and by said interlocutory decree, said order and said final decree, manifest error was committed, and your petitioners by direction of the Attorney General of the United States do hereby appeal from said interlocutory decree, order, and final decree to the Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record of proceedings upon which said final decree was based, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, in the Court House in the Post Office Building, Borough of Manhattan, City of New York, under the rules in such cases made and provided.

Dated, New York, November 14, 1921.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City.

[fol. 224] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS OF DEFENDANTS

Come now the defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America and file the following assignments of error upon which they will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1921, in the above entitled cause.

First. That the Court is and was without jurisdiction in this cause [fol. 225] and erred in denying the defendant's motion to dismiss the bill of complaint upon that ground.

Second. That it appears upon the face of the bill of complaint that the claim sued on is not a debt such as is cognizable by the Court under the provisions of Section 9 of the Trading with the Enemy

Act, and that the Court erred in denying the defendants' motion to dismiss the bill of complaint on that ground.

Third. That the claim sued on is not debt which was owing to the plaintiff or his assignor prior to October 6, 1917, and is therefore not a claim cognizable by the Court under the provisions of subdivision (e) of Section 9 of the Trading with the Enemy Act as amended by the Act of June 5, 1920, and that the Court erred in denying the defendants' motion to dismiss the cause on that ground.

Fourth. That it appears upon the face of the bill of complaint that the alleged contract sued on is and was void and unenforceable for lack of mutuality, and the Court erred in denying the defendants' motion to dismiss the cause on that ground.

Fifth. That it appears upon the face of the bill of complaint that the alleged contract sued on is and was void and unenforceable for indefiniteness, and the Court erred in denying the defendants' motion to dismiss the cause on that ground.

Sixth. That the Court erred in holding that the Mammoth Copper Mining Company was under obligation to sell all the product which it might produce to Beer, Sondheimer & Co., and that it could not [fol. 226] dispose of such product to any person other than Beer, Sondheimer & Co.

Seventh. That the Court erred in holding that the alleged contract in suit was a "requirement" contract.

Eighth. That the Court erred in holding that the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company, entered into a contract on the 29th day of September, 1914, with the Mammoth Copper Mining Company of Maine, for the sale of the total production of zinc crude ore shipped by the said Mammoth Copper Mining Company of Maine from its properties in Shasta County, California.

Ninth. That the Court erred in holding that the Mammoth Copper Mining Company of Maine duly performed all the obligations on its part to be performed under the terms of the alleged contract.

Tenth. That the Court erred in holding that the agreement between the original parties was not void for lack of consideration.

Eleventh. That the Court erred in holding that the Mammoth Copper Mining Company did not breach the contract by failing to ship the ore "in as near as possible equal weekly quantities."

Twelfth. That the Court erred in holding that the complainant came into equity with clean hands.

[fol. 227] Thirteenth. That the Court erred in holding that the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer breached said alleged contract in March, 1915, by refusing to receive or accept from the said Mammoth Copper

Mining Company of Maine further tonnages of ore tendered by the Mammoth Copper Mining Company of Maine, or pay therefore when tendered to the defendants.

Fourteenth. That the Court erred in holding that the complainant recover of the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, damages resulting from the refusal of said defendants to receive, accept and pay for the total production of zinc crude ore shipped by the said Mammoth Copper Mining Company of Maine, from its properties in Shasta County, California, during the period covered by the contract in suit dated August 26, 1914, together with his costs, charges and disbursements in this suit to be taxed.

Fifteenth. That the Court erred in holding that the defendants Francis P. Garvan (and his successor, Thomas W. Miller) as Alien Property Custodian, and John Burke (and his successor Frank White) as Treasurer of the United States of America, pay over to the plaintiffs from the property and money of said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, held by said Francis P. Garvan (and his successor, Thomas W. Miller) as Alien Property Custodian, and John Burke (and his successor Frank White) as Treasurer of the United States, [fol. 228] the amount of damages, costs, charges and disbursements.

Sixteenth. That the Court erred in appointing a special master to ascertain, take, state and report to the Court the amount of ores shipped by the said Mammoth Copper Mining Company of Maine from its properties in Shasta County, California, under the terms of said contract dated August 26, 1914, which said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer refused to accept, and the amount of damages which the plaintiff has suffered by reason of the alleged failure and refusal of said defendants to receive and accept and pay for said ore.

Seventeenth. That the Court erred in making a decree which ordered, adjudged and decreed that the complainant recover of the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, damages in the sum of Two hundred fifty-nine thousand, five hundred ninety-seven and 21/100 (\$259,597.21) Dollars, together with the costs, charges and disbursements in this suit.

Eighteenth. That the Court erred in making a decree which ordered, adjudged and decreed that the defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States pay over to the plaintiff, from the property and money of said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer held by said Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer [fol. 229] of the United States of America, the sum of \$259,597.21 with interest from July 3, 1919, in the sum of \$31,800.60, together

with the plaintiff's costs, charges and disbursements therein taxed at \$8,499.09, within ninety days after the entry of said order.

Nineteenth. That the Court erred in making a decree which ordered, adjudged and decreed that the plaintiff be allowed interest from the 3rd day of July, 1919, upon the amount of his claim as found by the special master.

Twentieth. That the Court erred in awarding to the complainant the costs of this suit to be taxed.

Twenty-first. That the Court erred in confirming the Master's report and overruling the defendants' exceptions to the same.

Twenty-second. That the Court erred in not sustaining the first exception taken by these defendants to the report made in this cause by the Special Master under date of March 31, 1921, to wit: that the Master found and reported "that the plaintiff has suffered damages in the sum of Two hundred fifty-nine thousand, five hundred ninety-seven and 21/100 dollars (\$259,597.21) by reason of the failure and refusal of the defendants, Beer, Sondheimer & Company, to receive, accept and pay for the ore therein referred to, whereas the Master should have found and reported that the plaintiff had failed to establish any damages whatsoever.

Twenty-third. That the Court erred in not sustaining the second exception taken by these defendants to the said report of the Special [fol. 230] Master to wit: that the Master found and reported "that in the dealings between the Mammoth Copper Mining Company and the United States Smelting Company in regard to the ore in question, the said companies dealt as separate and independent legal entities, and are to be so considered for the purpose of this litigation; and that the transaction between said companies evidenced by three certain letters from W. H. Eardley to C. W. Metcalf, dated respectively July 21, 1915, March 8, 1916, and March 20, 1916, was a valid contract of sale of the ore in question by the Mammoth Copper Mining Company to the United States Smelting Company, and was entered into in good faith; whereas the Master should have found and reported that in such dealings the said corporations did not act, and should not be regarded as separate and independent legal entities but as agents directed and controlled by a common principal, to wit, the Holding Company, and that the said transaction was not therefore a real sale or contract of sale."

Twenty-four. That the Court erred in not sustaining the third exception taken by these defendants to the said report of the Special Master, to wit: that the Master found and reported "that the damages suffered by the plaintiff are measured by the difference between the amount which Beer, Sondheimer & Company would have paid under their contract and the amount paid by the United States Smelting Company pursuant to the so-called contract of resale (less freight in each case) without taking into account profits realized upon the ultimate disposition of the metals recovered from the ore, whereas

[fol. 231] the Master should have taken such profits into consideration in reduction of the damages."

Twenty-fifth. That the Court erred in holding that the Mammoth Copper Mining Company and the United States Smelting Company dealt as separate corporate entities in relation to the treatment by them of the ore in suit.

Twenty-sixth. That the Court erred in permitting the complainant to amend his complaint after the trial, the entry of the interlocutory judgment and the assessment of damages thereunder, and just prior to the entry of the final decree, so as to claim a sum greater than that set forth in the original notice of claim filed by the complainant with the Alien Property Custodian.

Twenty-seventh. That the Court is and was without jurisdiction to award judgment in an amount greater than the amount of the alleged debt as set forth in the notice of claim filed by the claimant with the Alien Property Custodian pursuant to the provisions of the Trading with the Enemy Act and the amendments thereto.

Twenty-eighth. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"Q. 37. Mr. Metcalf, you were asked yesterday about the picking plant which is mentioned in the contract here in dispute, and which you testified was constructed at an expense approximately of \$10,000, and completed as a matter of fact, March 5, 1915, al-[fol. 232] though having previously given the date as February 26, 1915, to Beer, Sondheimer & Company, you adhered to that date. Will you state whether or not that picking plant would have been built by you if this contract had not been executed?

A. No.

Mr. Jerome: I do not think that is admissible.

The Court: I do not either. I will allow it, however, for what it is worth.

Mr. Jerome: Exception."

Twenty-ninth. That the Court erred in the trial of the cause when it refused to permit over exceptions taken at the time as shown by the record, one George W. Metcalf to give testimony in response to the question put to him by counsel for defendants, as follows:

"Q. 88. How did your production run in the mine, say from August 26th up to the time of the repudiation of this contract?

Mr. Sutro: Just a moment, Mr. Jerome. If you will pardon me, the contract was dated August 26th, but was not executed until September 29th; that is the evidence here.

I do not see the materiality of it, your Honor, prior to the execution of the contract. The witness testified the first shipment

made after its execution on September 29th was the first date here, November 28th, 1914 (referring to settlement sheets).

The Court: Confine yourself to that date.

Mr. Jerome: Then on my offer to show it from the 26th of August, the date of the contract, which is excluded to that ruling I except, and we will go to the 29th of September."

[fol. 233] Thirtieth. That the Court erred in the trial of the cause when it refused to permit, over exceptions taken at the time as shown by the record, one George W. Metcalf to give testimony in response to the question put to him by counsel for the defendants, as follows:

"Q. 147. During the year 1915 there was an extraordinary increase in the price of spelter; an unprecedented increase, was there not?

A. Yes.

Mr. Sutro: To what time in 1915 do you refer, Mr. Jerome?

Mr. Jerome: I say during that year there was an increase.

Mr. Sutro: In March, 1915, Beer, Sondheimer & Company broke this contract. I do not see what difference it makes whether there was a rise in the price of spelter after that.

Objection sustained. Exception."

Thirty-first. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"X Q. 202. You knew that Beer, Sondheimer & Company would take all the ore it could get under this contract, did you not?

Mr. Jerome: That is objected to as irrelevant, and thoroughly incompetent, what was in the mind of Beer, Sondheimer & Company, what they would take. They would take what they were obliged to take under this contract, and they would not take any more. I object to the question.

[fol. 234] Objection overruled. Exception."

(A.) It is my understanding that they wanted all of it that we could purchase.

Thirty-second. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"X Q. 204. There are telegrams in evidence here, Mr. Metcalf, from Mr. Salinger to yourself, the first asking you to state what you expect your zinc tonnage to be for October, 1914, and your estimate for November, and you say, "The zinc ore tonnage depends altogether on market price of spelter." Will you please explain what you meant by that reply?

Mr. Jerome: That is objected to as incompetent. The telegram speaks for itself; it is unambiguous.

Objection overruled.

A. I meant by that reply that I would go just as far as I could to meet the wishes of Beer, Sondheimer & Company in increasing the shipments, but that I was not willing to incur a great big expense, loss, in doing so."

Thirty-third. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"R. C. Q. 226. In that connection, Mr. Metcalf, I would like to ask you whether in June and July, 1914, when the zinc proposition at Kennett was first mentioned, whether or not you had in mind [fol. 235] shipping that zinc as concentrates possibly, or as crude ore?

Mr. Jerome: That is objected to as wholly irrelevant. It was before the contract.

The Court: I will allow it.

Mr. Jerome: Exception.

A. We expected at that time to be able to concentrate that ore and ship it as concentrates, but we had tests made by people whom we thought were competent, and they reported that we could not concentrate the ore, and then we developed this method of sorting or picking the ore which was actually used. Subsequently, we ourselves, in March, 1915, found that it could be concentrated in a measure, and after that time used such apparatus in conjunction with our sorting plant."

Thirty-fourth. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"C. Q. 46. I am asking you, was not the contract profitable or was it not profitable to Beer, Sondheimer & Company? You tell me that it was profitable in January; was it profitable in February?

Mr. Jerome: I fail to see the relevancy of it. I object.

The Court: I will allow it.

Mr. Jerome: Exception.

A. The question of being profitable or not did not enter at all. It was a question of quantity."

[fol. 236] Thirty-fifth. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time, as shown by the record, one W. H. Eardley to testify as follows:

"Q. 10. That is Mr. Putzel who was assistant manager of the Denver office of the American Metal Company in 1914. Did you have

any negotiations with anyone looking to the making of this contract, dated June 10th, 1914, Defendants' Exhibit S?

A. Yes, sir, with Mr. Putzel.

Q. 11. Now, will you state to the Court, please, the circumstances and conditions concerning these negotiations?

Mr. Jerome: That is objected to as wholly irrelevant and self-serving declaration. This is the American Metal Company contract.

The Court: I will allow it.

Mr. Jerome: Exception.

A. Mr. Putzel wired me in May, 1914, requesting that I notify him when I was about to leave Salt Lake to take a trip to the northwest. In pursuance to that telegraphic correspondence, Mr. Putzel met me in Salt Lake City in May, 1914, and we together made a trip over the northwest territory, he buying zinc ores and I contracting lead ores for the United States Smelting Company, during this trip, Mr. Putzel stating this: 'Eardley, you are probably around the country all the time'—

Mr. Jerome: I do not see what relevancy this has got. This contract says, 'all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, [fol. 237] California, or any other point by or under the control of the seller during the period of this agreement.'

The Court: I will allow it.

Mr. Jerome: Exception.

A. Mr. Putzel made this statement: 'Eardley, you are traveling now around the country west of the Rockies. You have men from your office out. Why not enter into a contract with us which would permit your people, your men, to pick up car loads of zinc ore here, there and everywhere, and ship to us. We are in need of zinc ores, not concentrates.' And while we were on that trip, we drew up a tentative agreement covering a small production of zinc middlings which we had over at Midvale, Utah, which were used as the basis of the contract, and then we included the words 'Kennett or any other point,' so we could ship under that contract any ores we may be able to pick up by purchase and sales agency contract, and the word 'Kennett' had the same significance as the words 'or any other point,' we first having to secure those ores from those points before we could ship them under this contract."

Thirty-sixth. That the Court erred in the trial of the cause when it permitted, over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"Q. 1. Mr. Metcalf, there has been before the Court here the much talked about contract between the American Metal Company and the United States Smelting Company, or turn it around, between the [fol. 238] United States Smelting Company and the American Metal Company, dated June 10th, 1914. When did you first see that contract?

A. Late in the fall of 1919.

Q. 2. Now, will you please tell the Court how you came to see it?

Mr. Jerome: That is immaterial.

The Court: I will allow it.

Mr. Jerome: Exception.

A. When I was engaged in looking up the price, to get a fair price for the ore involved in this suit, I was endeavoring to get the terms given in as many other contracts for zinc ore up to that time as possible, and I went through the file of contracts in the Salt Lake office of the United States Smelting Company, and among others, I saw this particular contract, but I did not at that time get a copy of it further than making a memorandum as to the terms."

Thirty-seventh. That the Court erred in the trial of the cause when it refused to admit in evidence, over exceptions taken at the time, as shown by the record, three telegrams offered by the defendants and marked Defendants' Exhibit Q for identification, being respectively a telegram, dated May 25, 1915, to Beer, Sondheimer & Co. from the United States Smelting Co., and two telegrams, dated June 3, 1915, and May 31, 1915, from the United States Smelting Company to Beer, Sondheimer & Co.

Thirty-eighth. That the Court erred in the trial of the cause when [fol. 239] it refused to admit in evidence, over exceptions taken at the time, as shown by the record, a letter offered by the defendants and marked Defendants' Exhibit R for identification, being a letter from the U. S. Smelting Company to National Zinc Company, Bartlesville, dated May 7, 1915.

Thirty-ninth. That the Court erred in the trial of the cause when it admitted in evidence, over exceptions taken at the time, as shown by the record, Plaintiff's Exhibits 70 and 71, being respectively a letter from the U. S. Smelting Company to the American Metal Company, Ltd., dated July 23, 1914, and a letter from the U. S. Smelting Company to the American Metal Company, dated July 15, 1914.

Fortieth. The Court erred in the trial of the cause when it admitted in evidence, over exceptions taken at the time, as shown by the record, Plaintiff's Exhibits 76A, being a letter dated July 28, 1914, from the U. S. Smelting Company to Mr. Schott, Manager, American Metal Company, 77A, being a letter dated July 20, 1914, from American Metal Company, Ltd., to U. S. Smelting Company, 78A, being a letter dated July 21, 1914, from American Metal Company, Ltd., to W. H. Eardley, 79A being a letter dated July 27, 1914, from U. S. Smelting Company to American Metal Company, Ltd., 80A being a letter dated July 20, 1914, from the American Metal Company, Ltd., to Mr. Eardley, 81 being a letter from Mr. Eardley to American Metal Company, dated August 4, 1914, 82 being a letter from the American Metal Company, Ltd., to Mr. Eardley, dated August 6, 1914, 83 being a letter from Mr. Eardley to

[fol. 240] American Metal Company, dated August 8, 1914, 84 being a letter from the American Metal Company to Mr. Eardley, dated August 12, 1914, 85 being a letter from Mr. Eardley to American Metal Company, dated August 14, 1914, 86 being a letter dated August 25, 1914, from Mr. Metcalf to Mr. Eardley, 87 being a letter dated March 25, 1915, from the United States Smelting Company to the American Metal Company, Ltd., 88 being a copy of letter dated March 25, 1915, from the U. S. Smelting Company to American Metal Company, Ltd., 89 being a letter dated April 1, 1915, from the American Metal Company, Ltd., to U. S. Smelting Company, 90 being a letter dated April 5, 1915, from U. S. Smelting Company to American Metal Company, Ltd., 91 being a letter dated April 14, 1915, from U. S. Smelting Company to American Metal Company, Ltd., 92 being a letter dated April 17, 1915, from American Metal Co., Ltd., to U. S. Smelting Co., 93 being a letter dated April 24, 1915, from American Metal Co., Ltd., to U. S. Smelting Co., 94 being a letter dated April 5, 1915, from Mr. Eardley to Mr. Metcalf, 95 being a letter dated April 10, 1915, from Mr. Metcalf to Mr. Eardley, 96 being a letter dated February 24, 1915, from Mr. Eardley to Mr. Metcalf, and 97 being a letter dated February 22, 1914, from Mr. Metcalf to U. S. Smelting Company, whereas in fact the above mentioned exhibits and each and all thereof, were incompetent, irrelevant and immaterial, as being *res inter alios acta* in no way binding upon the defendants in this cause.

Forty-first. The Court erred in the trial of the cause when it permitted, over exceptions taken at the time, as shown by the record, [fol. 241] the introduction of Plaintiff's Exhibits 65 and 66 into the evidence, which are respectively a telegram, dated January 27, 1915, addressed to Mr. Metcalf, signed Herbert Salinger, and a letter dated January 27, 1915, from Mr. Metcalf to Mr. Salinger, for the reason that it nowhere appears that Salinger had any authority to bind the defendants.

Forty-second. That the Special Master erred in the trial of the cause before him when he permitted, over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"Q. Did you state to Mr. Jerome that you considered that the freight rates you would have had to pay if you had continued shipping to Beer, Sondheimer & Company would have been based upon the value of the ore calculated under the terms of the Beer, Sondheimer & Company contract?

A. I believe I did say so.

Q. Would you consider that you would have had to pay that amount of freight if Beer, Sondheimer & Company had received the ore shipped by you, but had refused to pay for it?

Mr. Jerome: That is objected to. This is purely a question of law.

Overruled. Exception.
(Question read.)

A. I consider we would not."

Forty-third. That the Special Master erred in the trial of the cause before him when he permitted, over exceptions taken at the time as shown by the record, one Walter H. Eardley to testify as follows:

[fol. 242] "Q. Will you state under what agreement you received these ores from the Mammoth Copper Mining Company?

A. I wrote Mr. Metcalf a letter, I think it was on July 21st, advising him of the terms under which we would receive and pay for such ores.

Q. Will you state whether or not those terms were the——

The Master (interrupting): That is the letter that is in evidence as the contract between the Smelting Company and the Mammoth Copper Mining Company?

Mr. Stockton: That is the letter, yes.

Q. Will you state whether or not those terms represented the going terms for zinc ore?

A. In my opinion they did.

Q. In your opinion, could you have secured an equal amount of ore of the same quality from other concerns at as favorable a price as the United States Smelting Company paid for the Mammoth ore?

Mr. Tibbetts: Objected to; it is opinion evidence.

Objection overruled. Exception.

A. I would have purchased other ores which would have yielded the United Smelting Company as large a profit as the ores it received from the Mammoth Copper Mining Company."

Forty-fourth. That the Special Master erred in the trial of the cause before him when he permitted, over exceptions taken at the time as shown by the record, one Walter H. Eardley to testify as follows:

"Q. At that time, could you have made toll contracts for ores [fol. 243] similar to the Butte and Superior ores, upon terms more favorable to the United States Smelting Company?

Mr. Jerome: Objected to as purely hypothetical.

Objection overruled. Exception.

A. I made more contracts right after that on more favorable terms."

Forty-fifth. That the Special Master erred in the trial of the cause before him when he admitted into the evidence, over exceptions taken at the time as shown by the record, Plaintiff's Exhibit 102,

Plaintiff's Exhibits 101-a to 101-e, Plaintiff's Exhibits 103-a to 103-f and Plaintiff's Exhibit 33, all of which are respectively weights and analyses of products from stock piles 2 and 3, weights and analyses of product going into bins from April to July, 1915, weights and analyses of product from August, 1915, to January, 1916, and the product of Bin "C," the statement of lots 23, 24 and 25; and that these exhibits were inadmissible for the reason that they are secondary evidence and no proper foundation was laid for their introduction into evidence.

Forty-sixth. That the Special Master erred in the trial of the cause before him when he admitted into the evidence, over exceptions taken at the time as shown by the record, Plaintiff's Exhibit 118, being a series of vouchers purporting to show payments by United States Smelting Company to the Mammoth Copper Mining Company for certain ore shipments.

Wherefore, appellant-defendants pray that the decree of the said Court may be reversed, and in order that the foregoing assignments [fol. 244] of error may be made a part of the record the appellant-defendants present the same to the Court and pray that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided, all of which is respectively submitted.

Dated, New York, November 14, 1921.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City.

[fol. 245] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ALLOWANCE OF APPEAL OF DEFENDANTS

Upon reading the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America acting under the direction of the Attorney General of the United States, dated New York, November 14, 1921, for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

[fol. 246] Ordered, that the appeal as prayed for be and it is hereby allowed, and that a certified transcript of the record and proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit; and it appearing that this appeal is

taken by the direction of a department of the government, to wit, the Department of Justice, it is further

Ordered, that said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, either to prosecute the same or to answer in damages or costs.

Dated, New York, November 14, 1921.

John C. Knox, U. S. D. J.

[fol. 247] IN UNITED STATES DISTRICT COURT

CITATION ON DEFENDANTS' APPEAL—Omitted in printing

[fol. 248] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL OF DEFENDANTS

SIRS:

Please take notice that Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, defendants above named, by direction of the Attorney General of the United States, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the interlocutory decree made and entered on the 20th day of July, 1920, the order confirming Master's report and overruling defendants' objections thereto made and entered on the 25th day of July, 1921, and from the final decree made and entered on the 25th day of July, 1921, directing that the defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America pay over to the plaintiff from the property and money of the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and Emil Beer, held by said Thomas W. Miller, as Alien Property Custodian and Frank White, as Treasurer of the United States of America, the sum of Two hundred fifty-nine thousand five hundred ninety-seven dollars and twenty-one cents (\$259,597.21), with interest thereon from July 3, 1919, in the sum of Thirty-one thousand eight hundred dollars and sixty cents (\$31,800.60) together with the plaintiff's costs, charges and disbursements herein as taxed, at Eight thousand four hundred ninety-nine dollars and nine cents (\$8,499.09), within ninety days after the entry of said order; and from each and every part of said interlocutory decree, order and final decree.

Dated, New York, November 14, 1921.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City.

To Clerk of the United States District Court, Southern District of New York; Stockton & Stockton, Solicitors for Complainant, 2 Reece Street, New York City.

[fol. 250] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S PETITION FOR APPEAL

To the Honorable District Judge:

The above named plaintiff, Frederick Y. Robertson, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of July, A. D. 1921, does hereby appeal from said decree to the Circuit Court of Appeals for the Second Circuit, for the reason set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record of proceedings and document upon which said decree was based, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided, [fol. 251] and your petitioner further prays that a proper order relating to the security to be required of him be made.

Frederick Y. Robertson.

Dated, New York, January 24th, 1922.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S ASSIGNMENT OF ERRORS

Comes now the plaintiff, Frederick Y. Robertson, and files the following assignments of error upon which he will rely upon his [fol. 252] appeal from the decree made by this Honorable Court on the 25th day of July, 1921, in the above entitled cause.

First. That the Court erred in confirming the Master's report and overruling the plaintiff's exceptions to the same.

Second. That the Court erred in not sustaining the first exception taken by these defendants to the report made in this cause by the Special Master under date of March 31, 1921, to wit:

The Master has in said report stated and certified that the plaintiff is not entitled to recover interest upon the amount of his claim against the defendant- herein, whereas the Master ought to have found that the plaintiff was entitled to recover interest on the

amount due on each shipment of ore from a date sixty-one days after the date of shipment of each lot of the ore included in the plaintiff's claim, as more fully set forth in Plaintiff's Exhibits 124, 125 and 126.

Third. That the Court erred in not sustaining the second exception taken by the plaintiff to the said report of the Special Master, to wit:

The Master has in said report stated and certified that in computing the amount of the plaintiff's damage by reason of the defendants' breach of contract, there should be taken into consideration the difference between the amount of freight which the plaintiff's assignor actually paid for freight upon the resale of the ore and the sum which it is estimated the freight charges would have amounted to if the contract sued on had been performed, computed upon the basis of the price which the plaintiff's assignor was [fol. 253] to receive for said ore under the terms of the Beer-Sondheimer contract, whereas the Master ought to have found that neither the freight actually paid by the plaintiff's assignor nor the amount which it is estimated would have been paid in the due performance of the contract with Beer, Sondheimer & Co. should be taken into consideration in ascertaining the amount of the plaintiff's damages.

Fourth. That the Court erred in making a decree which ordered, adjudged and decreed that the plaintiff be allowed interest only from the 3rd day of July, 1919, upon the amount of this claim as found by the Special Master, instead of allowing the plaintiff interest on the amount due on each shipment of ore from a date sixty-one days after the date of such shipment.

Fifth. That the Court erred in making a decree which ordered, adjudged and decreed that a larger allowance for freight should be deducted from the amount due the plaintiff's assignor under its contract with Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company, than was actually paid by the plaintiff's assignor in making delivery of the ore refused by the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company.

Wherefore, plaintiff-appellant prays that the decree of the said [fol. 254] Court may be modified, and in order that the foregoing assignments of error may be made a part of the record the plaintiff-appellant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided, all of which is respectfully submitted.

Dated, New York, January —, 1922.

Stockton & Stockton, Solicitor- for Complainant, Office and
P. O. Address 2 Rector Street, New York City.

[fol. 255] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ALLOWANCE OF APPEAL OF PLAINTIFF

Upon reading the petition of Frederick Y. Robertson, plaintiff herein, for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

Ordered, that the appeal as prayed for be and it is hereby allowed, and that a certified transcript of the record and proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit; and further

Ordered, that the bond on appeal be fixed at the sum of Two hundred fifty dollars (\$250).

Dated, New York, January 25, 1922.

J. W. Mack, U. S. C. J.

[fol. 256] IN UNITED STATES DISTRICT COURT

CITATION—Omitted in printing

[fol. 257] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted.]

PLAINTIFF'S NOTICE OF APPEAL

SIR:

Please take notice that Frederick Y. Robertson, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the interlocutory decree made and entered on the 20th day of July, 1920, the order confirming the master's report and overruling the plaintiff's objections thereto made and entered on the 25th day of July, 1921, and from the final decree made and entered on the 25th day of July, 1921, directing that the defendants, Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America pay over to the plaintiff from the property and money of the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company, held by the said Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America, the sum of \$259,597.21, with interest thereon from July 3, 1919, in the sum of \$31,800.60, together with the plaintiff's costs, charges and disbursements herein as taxed at \$8,499.09, within ninety days after the entry of said order, and

more particularly so much of said interlocutory decree, order and final decree as only allows the plaintiff interest from July 3, 1919, and deducts a greater allowance for freight from the amount due to be paid by Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company, under the terms of the contract sued upon, than was actually paid by the plaintiff's assignor for the transportation of the ore covered by said contract.

Dated, New York, January 24, 1922.

Stockton & Stockton, Solicitors for Plaintiff, Office and P. O.
Address 2 Rector Street, New York City, N. Y.

[fol. 259] To Clerk of the United States District Court, Southern District of New York; William Hayward, Solicitors for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City; Hornblower, Miller & Garrison, Solicitors for Defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, and Emil Beer, copartners, doing business under the firm name and style of Beer, Sondheimer & Co., 24 Broad Street, New York City, N. Y.

[fol. 260] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

**Testimony Taken at Hearing Before Hon. A. N. Hand,
District Judge**

Before Hon. A. N. Hand, District Judge

New York, Wednesday, June 9, 1920.

Appearances: C. W. Stockton, Solicitor for Plaintiff, by Alfred Sutro (of San Francisco), Counsel; Francis G. Caffey, Solicitor for defendants, by William Travers Jerome and Harland B. Tibbitts.

[fol. 261] PLAINTIFF'S PRIMA FACIE PROOFS

GEORGE W. METCALF, a witness called in behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Sutro:

Q. 1. What is your name and where do you reside at present, Mr. Metcalf?

A. George W. Metcalf; I reside in Boston at present.

Q. 2. Were you at any time ever connected with the Mammoth Copper Mining Company of Maine?

A. I was.

Q. 3. In what capacity were you so connected?

A. I was manager of that Company from November, 1909, until May, 1919.

Q. 4. I show you a paper and ask you if you recognize it (handing witness paper).

A. I do.

Q. 5. Will you kindly look on the sixth page of that paper and see if there is on that paper any writing made by you?

A. There is.

Q. 6. What is that writing?

A. That is my signature as manager of the Mammoth Copper Mining Company.

Q. 7. Did you execute that contract on behalf of the Mammoth Copper Mining Company?

A. I did.

Q. 8. Do you know Herbert Salinger?

A. I do.

Q. 9. Have you seen him write?

A. Yes.

Q. 10. Do you recognize any writing on that page by Herbert Salinger?

A. I do, and saw him write this particular signature on this page.

Q. 11. Which particular signature?

A. "Herbert Salinger, Special Representative, Beer, Sondheimer & Company."

[fol. 262] Q. 12. Were those two signatures, your signature and Herbert Salinger's signature, written at the same time; that is to say, succeeding each other?

A. On the same day, within a few minutes of each other.

Q. 13. That is, after you had signed it, Mr. Salinger signed it?

A. I could not say which of us signed first, but they were written within a few minutes.

Q. 14. Do you recall on what date, or have you any means of refreshing your memory on what date those two signatures were made?

A. I both recall and have a means of refreshing my memory.

Q. 15. If you recall, that is sufficient. Will you state what the date was?

A. On September 29, 1914.

Q. 16. And wherabouts was that?

A. That was in the office of the United States Smelting Company, in Salt Lake City, Utah.

Q. 17. In Salt Lake City, Utah?

A. In Salt Lake City, yes, sir.

Mr. Sutro: I will ask that this paper which the witness has identified be marked in evidence.

Marked Plaintiff's Exhibit No. 1.

Mr. Sutro: Your Honor, it is admitted that the letter attached to the contract, dated New York, September 16, 1914, and signed Beer, Sondheimer & Company, per B. Elkan, is a letter executed by B.

Elkan and sent to Mr. Salinger, and it is also admitted that this letter was delivered to the Mammoth Company at the time of the execution of the contract. We offer that letter in evidence.

Marked Plaintiff's Exhibit No. 2.

[fol. 263] Q. 18. Mr. Metcalf, after that contract was so executed, will you state whether or not the same was partially performed by the Mammoth Company?

A. It was.

Q. 19. Do you recall to what extent?

A. Yes, I think so.

Q. 20. If so, state, please.

A. We proceeded to build a zinc sorting plant, as stated in the contract, at a cost of about \$10,000, and proceeded to mine——

Q. 21. Just a minute before you leave that. When was that sorting plant completed?

A. It was completed on March 5, 1915.

Q. 22. Well, when you speak of sorting plant, we are using the words "sorting plant" and "picking plant" as interchangeable terms?

A. They are synonymous.

Q. 23. When was the construction of that picking plant commenced, if you recall?

A. I think about September, 1914.

Q. 24. After the execution of this contract?

A. Just about the same time with the execution of the contract.

Q. 25. Did you proceed to produce and ship any ore to Beer, Sondheimer & Company under the contract?

A. We did.

Q. 26. Do you recall how much was shipped to Beer, Sondheimer & Company?

A. Approximately.

Q. 27. How much?

A. We shipped about 1,400 tons under the contract, which they received and paid for.

Q. 28. And approximately how much did they pay for it?

A. About \$30,000.

[fol. 264] Q. 29. Mr. Metcalf, who, if anybody, was your immediate superior in California?

A. Mr. A. P. Anderson.

Q. 30. What was his position with reference to the Mammoth Company?

A. He was the General Manager of the Mammoth Company.

Q. 31. Did you ever execute any contracts for the Mammoth Company without the approval of Mr. Anderson?

A. Not while he was General Manager.

Q. 32. I am referring to the time when he was General Manager. Was he General Manager at the time this contract was executed?

A. He was.

Q. 33. Do you recognize, on this Plaintiff's Exhibit 1, page 6 thereof, any writing of A. P. Anderson?

A. I do.

Q. 34. And what is there on that page which you recognize as the writing of A. P. Anderson?

A. His initials, the letters "A. P. A."

Q. 35. Will you state whether or not Mr. Anderson stated to you that he had approved that contract?

A. He did.

Q. 36. Prior to the time that you began to do anything under the contract?

A. He did. I would like to explain that answer a little. We had discussed the terms of this contract prior to its execution, and I knew in advance that Mr. Anderson would approve the terms, and the first time I saw him after it was executed, he told me that he did approve the terms. But there may have been a few cars of ore shipped under the contract before I saw Mr. Anderson, and learned from him that he had approved it.

(No cross-examination.)

[fol. 265] Mr. Sutro: We offer in evidence telegram dated August 26, 1914, and ask counsel if they will admit that it is a telegram sent by Beer, Sondheimer & Company to Mr. Salinger.

Mr. Jerome: We will. Counsel have agreed together that any document which purports to be genuine, we will require no further proof of its genuineness, this being subject to correction.

Mr. Sutro: This telegram relates to the contract in question.

Mr. Jerome: This telegram, it is conceded, has reference to the contract mentioned in the bill, Plaintiff's Exhibit No. 1.

Telegram marked Plaintiff's Exhibit No. 3.

Mr. Sutro: I would like to ask counsel if they have produced, in accordance with our demand, a letter dated August 29, 1914, from Mr. Eardley to Mr. Elkan. If not, we have a copy.

Mr. Jerome: This is the letter, and may be marked as Plaintiff's Exhibit, and it is stipulated that although it is stamped here "United States Smelting Company by," it was in fact sent by W. H. Eardley.

Mr. Sutro: I offer it in evidence.

Marked Plaintiff's Exhibit No. 50.

Mr. Sutro: Mr. Jerome, I suppose it is stipulated that the contract in question, except as changed by the parties, was the one enclosed therein?

Mr. Jerome: Yes, it refers to the contract, practically as I understand it, as the contract was afterwards signed, except that the [fol. 266] words "and concentrates" were stricken out.

Mr. Sutro: Yes, and another change which I think the telegrams will show.

Next I will offer in evidence a telegram dated September 4, 1914, which is admitted to have been a telegram sent by Beer, Sondheimer & Company to W. H. Eardley.

Marked Plaintiff's Exhibit No. 51.

Mr. Sutro: It is stipulated that the contract therein referred to, is the contract in question, Plaintiff's Exhibit No. 1.

Mr. Jerome: Well, it is stipulated, of course, that it is the contract which they were then talking about entering into, and which later was entered into.

Mr. Sutro: Next I offer in evidence a letter dated September 9, 1914, of which we have only a photostat copy, the original having been lost, from Beer, Sondheimer & Company, to Mr. Salinger, authorizing him to execute the contract.

Marked Plaintiff's Exhibit No. 8.

June 10, 1920.

GEORGE W. METCALF resumed the stand.

Direct examination by Mr. Sutro (continued):

Q. 37. Mr. Metcalf, you asked yesterday about the picking plant which is mentioned in the contract here in dispute, and which you testified was constructed at an expense approximately of \$10,000, [fol. 267] and completed as a matter of fact, March 5, 1915, although having previously given the date as February 26, 1915, to Beer, Sondheimer & Company, you adhered to that date. Will you state whether or not that picking plant would have been built by you if this contract had not been executed?

A. No.

Mr. Jerome: I do not think that is admissible.

The Court: I do not either. I will allow it, however, for what it is worth.

Mr. Jerome: Exception.

Q. 38. Will you explain your answer, please?

A. It would not have been built by us unless we either had this contract or some other assured outlet for the ore.

Q. 39. Well, the fact that this contract was executed——

A. That was the reason.

The Court: This is argumentative.

Q. 40. Mr. Metcalf, after you received the first notice from Beer, Sondheimer & Company of its refusal to take ore, will you state whether or not you shipped any more ore under the terms of the contract?

A. We did.

Q. 41. And where did you ship it to?

A. To Bartlesville, Oklahoma.

Q. 42. As designated in the contract?

A. Yes.

Q. 43. And about how many tons?

A. About 1,200.

Q. 44. That was until their final refusal to take any more?

A. Yes, until it was evident that they positively would not take any more ore.

(No cross-examination.)

[fol. 268] FREDERICK Y. ROBERTSON, a witness called in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Sutro:

Q. 1. Mr. Robertson, what is your full name, and where do you reside?

A. Frederick Y. Robertson, residing at St. Andrews Hotel, New York City.

Q. 2. Where were you born, Mr. Robertson?

A. At Morrison, Whiteside County, Illinois.

Q. 3. Have you ever since been a citizen and resident of the United States of America?

A. Yes, sir.

Q. 4. Have you ever had any affiliations with or connections of any kind with any alien enemies?

A. Not knowingly.

Q. 5. I hand you a paper, Mr. Robertson, and ask you if you recognize that?

A. Yes, sir.

Q. 6. You are the plaintiff in this suit, Mr. Robertson?

A. Yes, sir.

Q. 7. When was that paper received by you, approximately, if it was received; did you receive it?

A. Yes, sir, on the 27th day of September, 1916.

Mr. Sutro: I offer this paper in evidence.

Marked Plaintiff's Exhibit No. 52.

(No cross-examination.)

Mr. Sutro: We have the vouchers here for the amount of ore shipped in the twenty-seven shipments, from Beer, Sondheimer & Company, showing the amount of ore shipped and the amount paid, and it is as I stated in my opening statement, and it is, of course, subject to correction, if same is necessary.

[fol. 269] Mr. Tibbetts: We take the position that there were prior shipments under the contract, which you do not include in your statement.

Mr. Sutro: Of course, if it is so, you can hereafter prove it as part of your case: but with that exception I presume it will be admitted that 1,448,881 tons of ore, 2,897,673 pounds, were shipped as we claim under the contract, between November 28, 1914, and March 11, 1915, to Beer, Sondheimer & Company and that Beer, Sondheimer & Company paid therefor \$31,808.94, the ore constituting twenty-seven shipments. We have the vouchers for it, and if there is any

question about it, we will substantiate those figures to the satisfaction of Counsel.

Mr. Jerome: I accept Counsel's claim about that, that ore was shipped according to the documents showing shipments; that they were shipped at Bartlesville, Oklahoma, and that they were consigned to Beer, Sondheimer & Company, and paid for by this concern. That is all that is really material at this time. Counsel has interlarded it with remarks, such as "under this contract" and so on.

Mr. Sutro: I will withdraw that offer and show Counsel here a number of settlement sheets on the heading of Beer, Sondheimer & Company, which make up the quantity of ore to which I have just adverted, and ask Counsel if there is any question concerning their genuineness.

Mr. Jerome: No question concerning their genuineness. They appear to be genuine.

Mr. Sutro: Then we will offer these in evidence, together with a tabulation contained on the first sheet, and which constitutes the amount of ore shipped, as I stated in the offer that I made, and the amount said therefore.

[fol. 270] The Court: Which you contend was shipped under contract?

Mr. Sutro: Yes, sir. There is no objection to these, and we offer these in evidence.

Thirty-two sheets marked Plaintiff's Exhibit No. 31.

The Court: There is no dispute that it was shipped to you, but you claim that the contract was colorable, as I understand it, or unenforceable?

Mr. Jerome: Yes, sir.

Mr. Sutro: Those are the several settlement sheets from Beer, Sondheimer & Company for the ore that was shipped by the Mammoth Company under the contract and paid for.

Now, if your Honor please, in order that this proof may go in with some degree of certainty, and that your Honor and Counsel may understand it, I will offer evidence of the breach of the contract.

We first offer a telegram from Beer, Sondheimer & Company to the Mammoth Copper Mining Company of Maine, under date of March 17, 1915.

Marked Plaintiff's Exhibit No. 53.

I next offer in evidence a telegram from Beer, Sondheimer & Company to Mammoth Copper Mining Company, dated March 23, 1915.

Marked Plaintiff's Exhibit No. 54.

We next offer in evidence a telegram from Beer, Sondheimer & Company, to the Mammoth Company, dated March 24, 1915.

Marked Plaintiff's Exhibit No. 55.

[fol. 271] I offer in evidence a telegram which I understand Counsel concedes may go in—it is a copy, but the original is not here,

from the United States Smelting Company to Beer, Sondheimer & Company, dated Salt Lake City, May 14, 1915.

Marked Plaintiff's Exhibit No. 56.

I now offer the Answer from Beer, Sondheimer & Company, addressed to the United States Smelting Company, at Salt Lake City, Utah, under date of May 15, 1915.

Marked Plaintiff's Exhibit No. 57.

Have you the originals, Mr. Tibbetts, of certain letters from the Mammoth Company to Beer, Sondheimer & Company, dated respectively May 15, 1915, June 16, 1915, July 12, 1915 and August 5, 1915, offering the ore on hand?

(Papers produced by Defendant's Counsel).

We offer in evidence letter dated May 15, 1915, from the Mammoth Copper Mining Company to Beer, Sondheimer & Company, duplicates of which were sent, one to New York City and one to Salt Lake City, to the office of the Company at each place. That letter is in the same form as the next two letters which we will offer, except as to the amounts. They are all dated at Kennett, respectively May 15th, June 16th and July 12, 1915.

Three letters marked Plaintiff's Exhibits Nos. 58, 59 and 60.

[fol. 272] Mr. Sutro: I presume it will be stipulated, Mr. Jerome, that after the sending of the telegrams in March, 1915, Beer, Sondheimer & Company did not accept any more ore under the contract.

Mr. Jerome: I believe that to be a fact.

Mr. Sutro: I offer in evidence a letter dated August 5, 1915, from the Mammoth Company to Beer, Sondheimer & Company.

Marked Plaintiff's Exhibit No. 61.

Now, if your Honor please, there is one more formal matter, concerning which I understand there is no dispute. The issued capital stock of the Mammoth Copper Mining Company of Maine consists of 60,000 shares of the par value of \$25 each. All of that stock, 60,000 shares, was issued and there stood in the names of the seven directors, in order to qualify them as provided for by the By-Laws of the Company; one share of stock each; the Directors being William G. Sharp, Charles G. Rice, B. Preston Clark, James J. Starrow, S. W. Winslow, Jr., F. W. Batchelder and N. W. Rice. All of these gentlemen, except Mr. William G. Sharp, who has since died, are still directors of the Company, and each of them has still one share of stock in his name. The stock standing in the name of Mr. Sharp has never been transferred. The rest of the stock stands in the name of the United States Smelting, Refining & Mining Company, a corporation organized and existing under the laws of the State of Maine, and it is my understanding of what Mr. Jerome says, that that is sufficient proof to him. He admits the facts as I have stated them, concerning the ownership of the stock of the Mam-

[fol. 273] moth Company; that is to say it is not owned by alien enemies, and was not at the time the suit was commenced.

Mr. Jerome: It is owned by the United States Smelting & Refining Company.

Mr. Sutro: And the six gentlemen whom I have named.

Mr. Jerome: And how about the stock of the U. S. Smelting Company?

Mr. Sutro: That I will have to go into; I could not vouch for that. I would say, if you will take my word for it, that the most of it is owned by citizens of America. There is some owned in Scotland.

Mr. Jerome: As to this corporate organization, this United States Smelting Company, do we not agree substantially this, that the United States Smelting, Refining & Mining Company was the parent Company, and that the United States Smelting Company and the Mammoth Company, the Midvale and several others were subsidiaries, which this United States Smelting, Refining & Mining Company controlled absolutely?

Mr. Sutro: The United States Smelting, Refining & Mining Company is the owner of all the shares of stock of the Mammoth Copper Mining Company, of Maine, and I think with the exception of the Directors shares, also of the United States Smelting Company, and these other companies which have activities in this country, in various parts of the United States. There is no doubt about that, and no dispute about that.

I think, if your Honor please, with the exception noted, that we have made our prima facie case of the proof of the amount of ore produced subsequent to the refusal by Beer, Sondheimer & Company, [fol. 274] of March, 1915, to take any more ore under the contract, of the amount produced until the expiration of the year after the date of the completion of the picking plant, of the amount realized for the same, that it was sold at fair market prices, of the amount that should have been paid for the same under the terms of the contract with Beer, Sondheimer & Company, and figures to substantiate which we concede with the exception of two witnesses whom we will produce here, are contained in the Depositions which have been taken, supported by the exhibits that are on file, which resolve themselves into a matter of mere mathematical computation, and are by no means complicated, and simply consist of a number of figures, that the proof is now complete.

As I stated to your Honor, we shall not impose upon the Court, even by requesting that the Court hear those matters, and if your Honor decides that we have a cause of action, we will then ask your Honor to refer those questions and the taking of the testimony in that behalf, to a Master.

Plaintiff's prima facie proofs closed.

Adjourned until Thursday, June 10, 1920, at 10:00 A. M.

Trial Resumed

New York, June 10, 1920.

Mr. Sutro: If your Honor please, my attention is called to the fact that the statement that we rest, of course, is with this reservation, [fol. 275] that we have the depositions of certain witnesses, which I understand may be considered read hereafter, and that we want to take before the Master, if your Honor holds that we are entitled to do so, the evidence with reference to the amount of ore produced, the amount that we should have received for it under the Beer, Sondheimer contract, and the amount we did actually receive for it.

The Court: You do not want to put in as part of your prima facie case?

Mr. Sutro: No, sir, not in this case; but there is one other matter that I intended to offer yesterday, a copy of the Report of the Alien Property Custodian, dated February 22, 1919, and I understand that counsel do not object to the printed copy that we have here.

Mr. Jerome: No objection to the printed copy. I do not see its relevancy.

Mr. Sutro: We refer particularly to pages 64, 65, 66 and 67, and pages 88 to the middle of page 100, inclusive. The object is to prove that the Alien Property Custodian has considered the stock of Beer, Sondheimer & Company, Incorporated, as the property of the partners which formerly constituted the partnership firm of Beer, Sondheimer & Company. It is admitted in the answer.

Marked Plaintiff's Exhibit No. 62.

Plaintiff's prima facie proofs closed.

[fol. 276]

DEFENDANTS' PROOFS

Mr. Jerome: I offer in evidence a letter of July 28, 1914, from the United States Smelting Company, by W. H. Eardley, to B. Elkan, of Beer, Sondheimer & Company.

Mr. Sutro: If Counsel will state the relevancy or materiality of it, so that we will know to what it is directed.

Mr. Jerome: The relevancy and materiality of it in our opinion, is the introduction to what led up to the making of this contract. The communication itself bears, we think upon matters of the contract; it shows the condition of the parties at the time, what they had in mind, or possibly might have in mind; and the character of the communication, it is from the United States Smelting Company, and the stationery employed, the printed matter, on it tends to show that all this group of companies, whatever identity they might have as separate corporate entities in theory of law, when they get into a Court of Equity they are practically one concern, all being managed by the same people, with co-related officers and directors; that when one of this group did anything, it was really done by the whole.

I expect to follow that up later by showing, for instance, that if Mammoth sold ore to the United States Smelters, that Mammoth simply got a book of credit in Boston, and Smelters simply got a debit in Boston; in other words, it was all one part of this thing; and it will have very large bearing when we come later on to offer evidence.

Mr. Sutro: Of course, if your Honor please, we have not the slightest objection to your Honor looking at that letter. Our objection is [fol. 277] to its going into the record, for the reason that it will encumber the record and serve no purpose whatever.

May I say this to your Honor: The very letter which the United States Smelting Company sent to Mr. Elkan, which I think was the third or fourth exhibit that we introduced, dated August 29, 1914, which covered this contract and which sent it to Mr. Elkan for his examination, positively and distinctly negatives the idea that Mr. Jerome has tried to convey to your Honor, that the United States Smelting Company had the power or authority or right to contract for the Mammoth Company. I have stated frankly to your Honor that we shall not deny the fact that those companies were subsidiaries of the United States Smelting, Refining & Mining Company, but it is a fact, your Honor, as plain as that we are in this Court room, that we can demonstrate, if it becomes necessary—we want to keep it out of the record if possible, so as not to encumber the record,—that each one of these companies was a separate entity, and that not one of these companies could contract for the other; and illustrative of that I call your Honor's attention to the very letter which Mr. Eardley sent Mr. Elkan, and which has this language, and which is in evidence.

"We enclose you herewith copies of proposed contract between the Mammoth Copper Mining Company and Beer, Sondheimer & Company. We wrote Mr. Metcalf a few days ago relative to making a contract on his behalf with your company, but have not yet received authority from him to do so. We are, however, sending you this contract, and kindly request that after looking it over, you [fol. 278] advise us if same is satisfactory; and in the meantime we will undoubtedly have heard from Mr. Metcalf relative to its execution."

And, your Honor, the testimony is that Mr. Metcalf goes from Kennett to Salt Lake City to execute the contract for the Mammoth Company. Now, all that talk that Mr. Jerome made yesterday, and what he said this morning, about the inter-relations of these companies, is simply befogging the clearcut question before the Court, and I say that it is going to encumber this record with a lot of stuff that is of no consequence, because the proof can be made absolute and overwhelming, that not one of these companies contracted in any way for the other, but that each stood on its own footing, jealous of its own rights, trying to make the best showing possible, but, of course, co-operating to the best extent possible, through the organization that existed by reason of the common ownership of their several stocks by the United States Smelting, Refining &

Mining Company, as every well organized family should co-operate. That is the extent of that.

Objection overruled.

Marked Defendants' Exhibit D.

Mr. Jerome: I offer in evidence a letter of October 14, 1914, addressed to Beer, Sondheimer & Company, from United States Smelting Company.

Mr. Sutro: We urge the same objection.

Objection overruled.

Marked Defendants' Exhibit E.

[fol. 279] Mr. Jerome: I offer in evidence a letter of November 2, 1914, from G. W. Metcalf, to Beer, Sondheimer & Company.

Mr. Sutro: I would like to add this to the objection, your Honor, that it does not appear as yet why learned counsel wants to connect the two companies together, the United States Smelting Company and the Mammoth Copper Mining Company. There is no issue in this case that would make any such matter relevant or material, that I can possibly read out of the pleadings, as they have been framed. It certainly does not go to the question of mutuality or uncertainty or lack of authority for execution of the contract, which are the only defenses set up in the answer. Now, I submit to your Honor, that it is lugging into this record material that is clearly of no value to the Court, unless counsel will indicate what the purpose of it is. It certainly does not meet any issue raised by our Bill, and it does not support in the slightest any one of the affirmative defenses set up in the answer.

Objection overruled.

Marked Defendants' Exhibit F.

Mr. Sutro: I understand that the purpose of these exhibits now is to meet the affirmative defense which you have set up, of want of mutuality, that you have stated to the Court.

Mr. Jerome: I offer in evidence a letter of November 30, 1914, from Beer, Sondheimer & Company, to United States Smelting Company, with attached settlement sheets.

Mr. Sutro: This is a letter, if your Honor please, from one of the defendants to the United States Smelting Company. It is clearly a [fol. 280] self-serving declaration, and besides it is *res inter alios acta*. It is objectionable on that ground. It does not tend to clarify any issue in this case; that is why we object to it. We would not otherwise have any reason to object.

Objection overruled.

Marked Defendants' Exhibit G.

Mr. Jerome: I offer in evidence letter from United States Smelting Company, W. H. E., to Beer, Sondheimer & Company, dated December 4, 1914.

Marked Defendants' Exhibit H.

Mr. Jerome: I offer in evidence telegram from Herbert Salinger to G. W. Metcalf, dated October 22, 1914.

The Court: Who was Herbert Salinger?

Mr. Jerome: Herbert Salinger was the special agent, the special representative of Beer, Sondheimer & Company in Salt Lake City, who negotiated the contract now in suit.

Mr. Sutro: I understand, Mr. Jerome, that this telegram signed by Herbert Salinger, was sent on behalf of Beer, Sondheimer & Company?

Mr. Jerome: Yes.

Mr. Sutro: And that Mr. Salinger had authority to act for Beer, Sondheimer & Company in these matters?

Mr. Jerome: In sending this telegram he was authorized to do it. He was authorized by them to make inquiries in regard to what tonnage was coming forward.

What did I say?

[fol. 281] (Mr. Jerome's statement was read to him.)

Mr. Jerome: To make this inquiry; kindly change that.

Mr. Sutro: Let the record stand as it was, that there was conversation, and that Mr. Jerome changed it.

Mr. Jerome: I offer in evidence telegram from Herbert Salinger to G. W. Metcalf, dated October 22, 1914.

Marked Defendants' Exhibit I.

Mr. Jerome: I now offer in evidence a telegram under date of October 22, 1914, from G. W. Metcalf to Herbert Salinger.

Marked Defendants' Exhibit J.

Mr. Jerome: I offer in evidence telegram of October 24, 1914, to Metcalf from Salinger.

Marked Defendants' Exhibit K.

Mr. Sutro: I presume you will state on the record also that this telegram was sent in pursuance of Mr. Salinger's authority to make these inquiries?

That your Honor may understand—of course this is tried before the Court—there is a subsequent letter which Mr. Salinger sent, along in January, which came out on the taking of his deposition, which is written on Beer, Sondheimer & Company's letterhead, and signed by him and has relation to this matter, and counsel, I apprehend, when we come to offer that, will question Mr. Salinger's authority to send it. It is in no different position before the Court [fol. 282] than these telegrams, and that is the reason for this delicate touch with reference to his offer concerning these telegrams.

And if we are admitting these, we will ask the Court to let in that letter also.

Mr. Jerome: This will probably obviate the delicate touch end of it. This telegram that I am offering and those that have preceded it, were sent prior to that on inquiry from Beer, Sondheimer & Company, to Herbert Salinger, to ascertain these facts, and in view of their having asked him to ascertain these facts, he sent these telegrams to Mr. Metcalf, and got these replies. In that respect he was fully authorized to act for Beer, Sondheimer & Company, there is no question about it.

I offer in evidence telegram from Metcalf to Salinger, dated October 26, 1914.

Marked Defendants' Exhibit L.

Mr. Sutro: In connection with Defendants' Exhibits I, J, K and L, we will offer in evidence three telegrams, coming from the custody of the defendants. The first is from Beer, Sondheimer & Company to Salinger, dated October 22, 1914; the reply of Salinger to Beer, Sondheimer & Company of the same date, October 22nd, and the reply of Beer, Sondheimer & Company to Salinger, dated October 23, 1914.

Marked collectively Plaintiff's Exhibit No. 63.

Mr. Jerome: I offer in evidence telegram of November 20, 1914, from Salinger to Metcalf.

[fol. 283] Mr. Sutro: That was sent under authority, was it?

Mr. Jerome: That was sent by Herbert Salinger.

Marked Defendants' Exhibit M.

Mr. Jerome: I offer in evidence telegram dated November 23, 1914, to Herbert Salinger from G. W. Metcalf.

Marked Defendants' Exhibit N.

Mr. Sutro: In connection with Defendants' Exhibits M and N, we offer in evidence two telegrams coming from the custody of the defendant, one from Beer, Sondheimer & Company to Salinger, dated November 19, 1914, and the other a reply from Salinger to Beer, Sondheimer & Company, dated November 23, 1914.

Marked collectively Plaintiff's Exhibit No. 64.

Mr. Jerome: I offer in evidence a letter of April 6, 1915, from Beer, Sondheimer & Company to Mammoth Copper Mining Company.

Mr. Sutro: This is objected to, if your Honor please, on the ground that it is a self-serving declaration, containing an unaccepted offer of compromise, and is not competent in this case for any purpose.

The Court: It may be competent to explain the second letter, that is all. Of course, it is not in itself evidentiary. I do not think there [fol. 284] is really any bearing, except an express or implied admission contained in your own letter.

Objection overruled.

Mr. Jerome: And to render their letter intelligible, we have got to have this.

Letter marked Defendants' Exhibit O.

I offer in evidence letter of April 15, 1915, to Beer, Sondheimer & Company, from the Mammoth Company.

Marked Defendants' Exhibit P.

Mr. Sutro: I understand that is in answer to the other one.

Mr. Jerome: I offer in evidence a telegram of May 25, 1915 to Beer, Sondheimer & Company from the U. S. Smelting Company.

Mr. Sutro: That is objected to. I would like your Honor to look at that, and you will see it relates purely to a proposition of compromise which was not accepted.

Objection sustained. Exception.

Mr. Jerome: Mark it for identification; and I will offer with it these two telegrams of June 3, 1915, and May 31, 1915, from the U. S. Smelting Company to Beer, Sondheimer & Company. I assume they will be excluded under the same ruling?

Same ruling. Exception.

[fol. 285] Mr. Jerome: We offer them to show the relationship between these two corporations, the control over the Mammoth by the U. S. Smelting Company.

Three telegrams marked Defendants' Exhibit Q for identification.

I offer in evidence letter from the United States Smelting Company to National Zinc Company, Bartlesville, of May 7, 1915.

Mr. Sutro: We object to it on the ground that it is totally irrelevant and immaterial.

Mr. Jerome: It is offered on the same line. It is Mammoth ore that they say they sent forward to our refineries at Bartlesville, that we refused to accept. Then we find not the Mammoth dealing with it, but the United States Smelting Company, showing the close relationship between the two.

Objection sustained. Exception.

Marked Defendants' Exhibit R for identification.

Mr. Jerome: We will now read in evidence certain portions of the cross examination of the witness Frederick Lyon.

Mr. Sutro: I submit, your Honor, that the entire deposition should be read. As I understand it, you cannot pick out parts of a deposition and read it.

Objection overruled.

[fol. 286] Mr. Tibbetts: I will read from page 2 of the direct examination of Frederick Lyon, taken on behalf of the plaintiff, pursuant to stipulation, on November 6, 1919, in New York City:

"Q. 1. Mr. Lyon, state your name, residence and occupation?"

"A. Frederick Lyon; at the present time I have no position. I resigned from my position recently, but at the time I was Vice-President in Charge of Operations of the United States Smelting, Refining & Mining Company and the Mammoth Copper Mining Company, a subsidiary Company.

"Q. 2. To what do you refer, Mr. Lyon—to what date do you refer—when you say 'at the time'?

"A. At the time—I mean 1915 and previous to that time.

"Q. 3. Were you connected with the Mammoth Copper Mining Company?

"A. I was, as Vice-President in Charge of Operations."

I now read from the cross examination of the same witness, page 14:

"X Q. 78. What was your connection with the United States Smelting Company in 1915?

"A. The same as with the Mammoth Company. I was Vice-President in Charge of Operations"—

Mr. Sutro: Just a minute. We object to the question, what his connection with the United States Smelting Company was, because it is not a company before this Court and the evidence is entirely immaterial. It is on cross examination.

[fol. 287] Mr. Tibbetts: This is along the same line, as showing the identity of their officers.

Objection overruled.

"A. The same as with the Mammoth Company. I was Vice President in charge of operations of all the subsidiary companies of the United States Smelting, Refining & Mining Company. The United States Smelting Company was one, and the Mammoth Company was another, and there were others.

"X Q. 79. What do you mean by subsidiaries?

"A. Well, they were companies of which the United States Smelting, Refining & Mining Company was a holding Company at that time and owned the stock of the Mammoth Copper Mining Company. It also owned the stock of the United States Smelting Company—either all or the big majority of the stock.

"X Q. 80. You were Vice-President then in Charge of Operations of the three companies which have been mentioned, namely, the Mammoth Copper Mining Company, the United States Smelting Company and the United States Smelting, Refining & Mining Company?

"A. Yes. The last was the holding company.

"X Q. 81. And is that true of other officers, namely that they held positions in all three of those companies?

"A. Oh, yes.

"X Q. 82. Is it the fact that the principal officers of these three companies were the same? You use the word 'head' officers?

"A. Yes. President, Vice-President are all the same.

"X Q. 83. By principal officers I mean President, Vice-President, Secretary and Treasurer.

"A. Yes. All the same.

[fol. 288] "X Q. 84. And were their boards of directors the same?

"A. The boards of directors were the same."

Page 18:

"X Q. 115. Was there a Mr. Eardley connected with the Mammoth Company?

"A. He was connected with the United States Smelting Company.

"X Q. 116. Had he no connection with the Mammoth Company?

"A. No official connection.

"X Q. 117. Well, had he any actual connection?

"A. Officers of one company very often transacted business of another company if it was delegated to them. He might have had that, but I don't remember if he had in this particular case.

"X Q. 118. What was his connection with the Smelting Company?

"A. In the Smelting Company he was ore purchaser at that time.

"X Q. 119. Did he have anything to do with the sale of ores for the Mammoth Company.

"A. I don't know whether he had himself. Mr. Heintz had a good deal to do with it. Whether Mr. Heintz delegated it to him, I don't know.

"X Q. 120. Mr. Heintz had something to do with the sale of ores for the Mammoth Company, although Mr. Heintz was manager of the Smelting Company?

"A. Yes.

"X Q. 121. Well, then, Mr. Eardley may also have had something to do with the sale of ores of the Mammoth Company?

"A. He may have had."

Page 22, about two-thirds of the way down:

[fol. 289] "X Q. 160. Do you personally remember when you began producing zinc ores from the Mammoth mine?

"A. No, I don't. Produced in mining?

"X Q. 161. Yes?

"A. I don't know.

"X Q. 162. Did you produce zinc ores from that mine before you began shipping to Beer, Sondheimer & Company under this contract?

"A. I don't recollect.

"X Q. 163. Did you ever have more than this one contract with Beer, Sondheimer & Company?

"A. I don't know of any other.

"X Q. 164. Did you ever sell any zinc ores from that mine before this contract was made?

"A. I can't tell. You see I was not connected with the operations directly.

"X Q. 165. You were Vice-President in Charge of Operations?

"A. Yes. I got reports.

"X Q. 166. You got reports?

"A. Yes.

"X Q. 167. You kept in touch with the Company's operations?

"A. Yes.

"X Q. 168. And you passed upon all contracts which it made?

"A. Yes. I have no personal knowledge.

"X Q. 169. Did you ever see a contract for the sale of zinc ores from that mine prior to this one?

"A. I don't remember.

"X Q. 170. If there had been such a contract, it would have come to your attention?

"A. Yes. If there had been a contract, it would have come to my attention.

"X Q. 171. Did the United States Smelting Company sometimes contract for the sale of ores from this mine?

"A. Oh, yes."

[fol. 290] GEORGE W. METCALF, recalled by the defendant, having been previously sworn, testifies as follows:

Direct examination by Mr. Jerome:

Q. 1. Mr. Metcalf, how long were you in charge of the mines there in Kennett, California?

A. About ten years.

Q. 2. And that covered the periods of 1914, 1915, and 1916?

A. Yes.

Q. 3. That is an old mine, is it not?

A. I beg your pardon?

Q. 4. That mine there is an old mine is it not, the Mammoth?

A. Well, that is a comparative phrase. It was first developed on a large scale in 1904 and 1905.

Mr. Sutro: I understand you are calling Mr. Metcalf as your witness now?

Mr. Jerome: I am calling Mr. Metcalf. I am not going to be limited by your understandings in this case. If I were, I would be understood out of court.

Mr. Sutro: Then I will ask the Court, simply with reference to our right of cross examination.

The Court: I rule that he is Mr. Jerome's witness. If you wish it, I will state it as the rule.

Q. 5. Had that mine in 1914 quite extensive workings?

A. Yes, it had.

Q. 6. And was there any other mine at Kennett at that time, except the mines of this Company?

A. Near Kennett, yes; not right in Kennett.

[fol. 291] Q. 7. But, there were none that the Mammoth was interested in, or the U. S. Metals, or their parent Company?

A. Other than what?

Q. 8. Other than the mine which you had charge of?

A. I was in charge of all the local operations of the Mammoth Copper Mining Company.

Q. 9. This Company, as its name would seem to indicate, was primarily and had been worked for many years as a copper mine?

A. Yes.

Q. 10. It had a copper smelter at its works?

A. Yes.

Q. 11. At Kennett, at its mine?

A. Not at its mine.

Q. 12. Well, in the immediate vicinity?

A. Yes.

By Mr. Sutro:

Q. 13. State how far, so that the Court will understand it?

A. About three and a half miles.

By Mr. Jerome:

Q. 14. And it smelted its copper ores, or ores that it treated as copper ores, where the main content sought to be obtained was copper; those it treated in its own smelter?

A. Ordinarily, yes.

Q. 15. When did it begin to have any output of zinc ores?

A. The first ore that was ever shipped from the Mammoth as zinc ore was in the early part of 1914; I do not remember the exact date, but I think about April.

Q. 16. And at that time was it still mining and smelting copper ores?

A. Yes.

Q. 17. But prior to April, 1914, there had been, I understand you, no product for market purposes of zinc ores, ores where the [fol. 292] primary product was zinc?

A. You are correct.

Q. 18. In these zinc ores they differ quite materially in different mines in their metallic content, do they not?

A. Yes, they do.

Q. 19. Both in zinc, and in silver, gold, lead and copper found in conjunction with the zinc?

A. Yes.

Q. 20. And they so differed in this particular mine?

A. Yes.

Q. 21. I mean, it would differ from other mines?

A. Yes, all mines are not the same.

Q. 22. And in the process of smelting ores the contents, for instance, if you have an ore where your object is to obtain zinc from it, you want to treat it as primarily a zinc ore, the other contents of that ore are important elements in handling that ore in smelters, are they not?

A. Yes.

Q. 23. And often ores from different mines are mixed, in order that there may be a proper silicious content to make a proper flux and get rid of your iron, and so on; is that not correct?

A. Yes.

Q. 24. So that in a broad sense it is true that of these zinc ores used in this country at different points, each one may be said, according to the needs of the smelter, to a unique ore?

A. Well, I do not exactly understand the meaning of "unique" in that connection.

Q. 25. Well then, put it in this way: You were aware, were you not, that Beer, Sondheimer & Company, in their smelter at Bartelsville, Oklahoma, or the smelter they controlled there, were desirous of obtaining an ore of high silicious content?

[fol. 293] A. I do not know that I had that knowledge.

Q. 26. In the early negotiations leading up to this contract, was it not brought to your attention that Beer, Sondheimer had made inquiries as to the silicious content, and that you had replied orally to the inquiries that were put to you, that you had no practical method of determining with accuracy at the Kennett mine what the silicious content would be, and, therefore, you were unwilling to have the question of silicious content enter into this contract to any considerable extent? Was not such oral discussion had with you, in this instance, or brought to your knowledge?

A. I have no recollection of that.

Q. 27. When you began the mining of zinc ore in April, 1914, what was the character of the ore that you were then mining?

A. It was a mixture of various constituents. It contained zinc, copper, gold, silver, silica and iron.

Q. 28. And at that time did not your ore run rather high in copper content?

A. That again is a comparative phrase. I do not remember exactly what it did run.

Q. 29. Well, as you began to mine it, was it not largely a question in your mind, managing it there, whether the particular products of this ore, contained zinc, whether it should be treated as zinc and disposed of to smelters, or whether it should be treated as a copper ore and smelted in your own refineries or smelters at Kennett?

A. That would be a question that would have to be decided as to any particular ore.

Q. 30. For instance, the metallic content of zinc might be such, relative to copper, taking into consideration both the zinc market and the copper market, whether it would be treated as a zinc ore and [fol. 294] shipped out, or sold to some one, or whether it would be treated as a copper ore and handled in your own smelter?

A. Or whether it was possible to treat it commercially in any way.

Q. 31. Yes; those would be questions that would depend upon the examination of the ore as it was mined?

A. Yes.

Q. 32. And the state of the market relative to the metallic contents?

A. Yes.

Q. 33. When you began to mine this zinc ore in April, or thereabouts, 1914, where was the body of ore located in the mine or the mines at Kennett?

A. My recollection is that the first ore that we shipped came from what was called the Iola zinc ore body in the Mammoth mine.

Q. 34. You had found in your exploratory work there that there was a body of zinc ore?

A. Yes, sir.

Q. 35. And about when was it discovered that there was a body of zinc ore there, that was worth while considering mining?

A. Early in 1914.

Q. 36. So that up to 1914, during the period of your incumbency in that office, it had not seemed that there was any zinc ore there that was worth mining, or was deemed worth while going into the mining of it as zinc ore?

A. We had not considered that there was any such.

Q. 37. Where did this body of zinc ore lie, by itself, or was it in any of the mines already opened?

A. It was close to our copper ore bodies, almost in contact with one of them.

Q. 38. But you continued, or you could have continued, could you not, to have mined your copper and paid no attention to your zinc ore at all?

A. In parts of the mine you could.

[fol. 295] Q. 39. Well, as a whole, there was no substantial interference with your mining, because there happened to be some zinc ore where you discovered it, was there?

A. No.

Q. 40. When you began to mine it in April, 1914, about what was your product then, your weekly or monthly production?

Mr. Sutro: It seems to me, your Honor, that right at this point we should object to any inquiry regarding the quantity. It is perfectly immaterial. There has been a similar case against this same co-partnership in this District, where his Honor, Judge Learned Hand, wrote the Opinion, the case of the Hustis Mining Company against Beer, Sondheimer & Company, where this question of quantity arose. The case is reported in 239 Fed. Rep., quite a lengthy opinion was written. The question of quantity there was involved under the assumption on the part of the defendant, Beer, Sondheimer & Company, that inasmuch as it had contracted for the total output, and had mentioned a given quantity, that the quantity controlled; but his Honor, Judge Learned Hand, decided following the Raleigh case in 96th U. S., with which I take it your Honor, of course, is also familiar, that the quantity is merely an estimate, an expectation of the parties, and has no control whatever, so far as the contract is concerned. Where the contract is for the output it means what it says, and the expectation of the parties with reference to quantities, [fol. 296] even though they be specified by way of estimates, is entirely immaterial.

The Court: That may be so, but I will allow this testimony now.

A. It had not hardly reached a stage where there was any weekly or monthly production.

Q. 41. Well, when did you first begin to really have what you might describe as a weekly and monthly production?

A. I would not say that we hardly reached that stage before possibly January, 1915.

Mr. Sutro: That question is compound. You say a weekly or monthly production? I will object to the question on the ground that it is compound and misleading. It contains two elements.

Q. 42. When did you begin serious mining of the zinc ore?

A. As well as I remember we began stoping about January or February, 1915. Operations prior to that time had been in the way of development, determining how great the ore body was, and providing means for extracting the ore.

Q. 43. Then see if I understand you aright in regard to that: Up to about January, 1915, you were largely engaged in what I perhaps may correctly describe as exploratory work, to ascertain the quality and quantity of the zinc ore bed available; am I correct?

A. Yes, I would say that was correct.

Q. 44. And during that period you had what you might term a comparatively slight and incidental product of this ore?

A. Yes.

[fol. 297] Q. 45. Were you aware of a contract entered into between the United States Smelting Company and American Metal Company in June of the year 1914?

A. When was I aware?

Q. 46. Well, were you aware of it at any time you learned of it?

A. I have heard of it within the last few years.

Q. 47. When did you first hear of it?

A. I cannot be quite sure whether I knew of this prior to 1916 or not.

Q. 48. Is it clear in your mind that you did not hear of it at the time it was entered into?

A. I am not quite sure whether I knew there was a formal contract, or simply an arrangement enabling the United States Smelting Company to sell certain ore to the American Metal Company.

Q. 49. At some time in the year 1914, did you become aware of some kind of an arrangement whereby the United States Smelting Company might sell zinc ores of the Mammoth?

A. Yes.

Q. 50. Can you give the time in 1914 when you first became aware that there was some sort of an arrangement whereby the United States Smelting Company could sell zinc ores of the Mammoth?

A. Well, the United States Smelting Company was never authorized to sell zinc ore from the Mammoth.

Q. 51. What was this some kind of an arrangement to which you have referred?

A. That was an arrangement for selling zinc ores which they might themselves control.

Q. 52. Well, you stated, as I understood you a moment ago, that you became aware of an arrangement whereby the United States Smelting Company might sell the zinc ores from Mammoth?

[fol. 298] A. They might, if I granted to them the right to do so.

Q. 53. That is, these companies, of course, it is evident, were in very close and intimate relations, were they not?

A. Yes.

Q. 54. And the particular company that you were attached to, the Mammoth Company, had no selling mechanism, so to speak, for zinc ores, did it?

A. No.

Q. 55. And the United States Smelting Company was primarily a zinc smelting company?

A. No.

Q. 56. Was it a smelting company at all?

A. Yes.

Q. 57. Well, it did smelt zinc ores?

A. No, not at that time.

Q. 58. But it dealt in zinc ores at that time, did it not?

A. It produced certain zinc concentrates itself, and sold those concentrates.

Q. 59. So that really the United States Smelting Company at that time was practically, so far as zinc ores owned or controlled by the United States Smelting, Refining & Mining Company was concerned, handling the sales end of zinc ores that the parent Company might control?

A. I have no knowledge as to that.

Q. 60. Well, in the year 1914, I understand you that you became aware of some understanding, as you characterize it, whereby the U. S. Smelting Company might or would handle some of the zinc ores, or might sell some of the zinc ores which it was contemplated the Mammoth would produce?

A. I was advised—well, I had previously asked them to find a market for this zinc ore, and as I knew the United States Smelting Company was habitually marketing zinc ore, I requested Mr. Heintz, [fol. 299] the manager of the United States Smelting Company, either personally, or through his ore-buying department, and who also acted as an ore-selling department, to find a market for our zinc ore.

Q. 61. Subsequently, there were times at which the Mammoth did sell zinc ores to the United States Smelting Company, were there not?

A. I believe there was one such occasion.

Q. 62. And when was that?

A. I cannot place it exactly; I think it was in 1916.

Q. 63. You became aware of the fact, did you not, that subsequent to this year, 1914, the United States Smelting Company acquired certain zinc smelters at Altoona and elsewhere; did you not?

A. Yes.

Q. 64. And it also was a fact that these ores that were tendered to Beer, Sondheimer & Company, and acceptance of which was refused,

were sold to those smelters belonging to the U. S. Smelting Company at Altoona?

A. Well, I would not phrase it just that way. They were sold to the United States Smelting Company, and they smelted them at those smelters.

Q. 65. So that these ores that plaintiff here contends were covered by this contract between Mammoth and Beer, Sondheimer & Company, which you executed—those ores which were tendered and not accepted by Beer, Sondheimer & Company, were sold to the United States Smelting Company?

A. Yes.

Q. 66. And were shipped then, such as had previously been shipped to Bartlesville, were shipped then from Mammoth to these smelters, owned by the United States Smelting Company?

A. Yes.

Q. 67. And at the time they were shipped to the United States [fol. 300] Smelters Mr. William H. Eardley was in charge of those smelters, was he not?

A. He was the manager of those smelters.

Q. 68. And that is the same Mr. Eardley who prior to the purchase of those smelters had been connected with the United States Smelters and had executed this particular contract?

A. No, Mr. Eardley did not execute it.

Q. 69. You executed it?

A. Yes.

Q. 70. Mr. Heintz witnessed it?

A. Yes.

Q. 71. And Mr. Eardley negotiated it?

A. Yes.

Q. 72. During the course of its negotiation, of course, were you consulted?

A. Yes.

Q. 73. Consulted as to its terms?

A. Yes.

Q. 74. So that it was Mr. Eardley, was it not, who prepared the contract, prepared the text of it?

A. I do not know about that from my own knowledge.

Q. 75. Well, did you prepare the text?

A. No.

Q. 76. Did Mr. Heintz, so far as you know, prepare the text?

A. I do not know.

Q. 77. Eardley's office, the U. S. Smelting Company and the Mammoth and all those concerns, were in the same building there in Salt Lake City, were they not?

A. Will you repeat the question?

Q. 78. Had offices together?

A. Who?

Q. 79. The Mammoth had offices in Salt Lake City?

A. No.

Q. 80. The U. S. Smelters had?

A. Yes.

Q. 81. And Mr. Eardley was at that office, was he not, at the time of the execution of this contract in suit?

A. No, he was not there at that time.

Q. 82. I do not mean at the very moment the signature was put to [fol. 301] it, but during that period he was attached to that office; that was his headquarters?

A. That was his headquarters.

Q. 83. From April, 1914, when you first began to develop this zinc ore, mine it, how frequently did you make shipments of that ore out? Did you make any shipments of ore out from the mine prior to the date of the contract with Beer, Sondheimer, the 26th of June, 1914?

A. Yes, we did.

Q. 84. Or August, 1914?

A. Yes.

Q. 85. To whom did you make such shipments?

A. They were all to Beer, Sondheimer & Company.

Q. 86. So that prior to the date of the contract you made some shipments to Beer, Sondheimer & Company?

A. Yes.

Q. 87. Now, commencing from the date of the contract you continued to make shipments?

A. Yes.

Q. 88. How did your production run in the mine, say from August 26th up to the time of the repudiation of this contract?

Mr. Sutro: Just a moment, Mr. Jerome. If you will pardon me, the contract was dated August 26th, but was not executed until September 29th; that is the evidence here.

I do not see the materiality of it, your Honor, prior to the execution of the contract. The witness testified the first shipment made after its execution on September 29th was the first date here, November 28, 1914 (referring to settlement sheets).

The Court: Confine yourself to that date.

Mr. Jerome: Then on my offer to show it from the 26th of August, [fol. 302] the date of the contract, which is excluded, to that ruling I except, and we will go to the 29th of September.

After Recess

Q. 89. Mr. Metcalf, the settlements for ore on this Beer, Sondheimer contract were all made with Boston, with the parent company, were they not; in other words the Mammoth would be credited in Boston with the sales, but Boston would receive the cash or its equivalent in drafts or bills?

A. You mean the payments to the Mammoth from the U. S. Company?

Q. 90. No, I am speaking now, until Beer, Sondheimer & Company repudiated the contract, payments for ore under this contract between Mammoth and Beer, Sondheimer & Company, were made to the United States Smelting, Refining & Mining Company of Boston?

A. Yes, we received credit from them.

Q. 91. And you received credit on the books?

A. Yes.

Q. 92. You never got any of the cash or the drafts or the checks or anything of that kind; they were always sent to Boston?

A. We did not get the actual checks, no.

Q. 93. And when you came later on to sell ore to the U. S. Smelting Company which you mined, as I understand the claim is, for account of Beer, Sondheimer & Company, there was nothing in the way of cash payments, or its equivalent, passed between you and Smelters and Mammoth? That was all done by bookkeeping cross entries up at Boston, was it not?

A. The credits from the U. S. S. Company to the Mammoth Copper [fol. 303] Mining Company, were all made through the Boston office.

Q. 94. The production of the Mammoth Copper Mining Company during the year 1915 was approximately 298,473 tons, was it not?

Mr. Sutro: That I object to, if your Honor please, on the ground that it is wholly immaterial. I do not see what the general production of the Mammoth Company can have to do with any dispute here.

Mr. Jerome: I read from the Tenth Annual Report of the United States Smelting, Refining & Mining Company, for the year ending December 31, 1915, page 12, subdivision 4.

Mr. Sutro: I cannot see why it is in any sense material. I object to it on the ground that it is immaterial.

Objection overruled.

Mr. Jerome (reading): "4. Mammoth Copper Mining Company. The mine produced 290,473 tons of ore, of which 46,027 tons carried high percentages of zinc. The latter (that is the zinc) was taken to a sorting plant"——

Q. 95. A sorting plant and a picking plant are the same thing, are they not?

A. Yes.

Mr. Jerome continuing): "—to a sorting plant constructed at the beginning of the year at the smelting works of the Mammoth Copper Mining Company, where the ore was divided into two products, [fol. 304] one product being zinc ore that was shipped to the zinc smelters of the Company in Kansas, and the other the copper ore which was smelted on the spot."

Q. 96. That is correct, is it not; practically correct?

Mr. Sutro: Just a minute, Mr. Jerome. I further want to state to your Honor that this is not the declaration of the Mammoth Company. It is a statement of an officer of the United States Smelting, Refining & Mining Company, in a letter addressed by him to the president of that Company. I do not see how it can in any way be material to an issue between the Mammoth Company and a stranger.

It is not a declaration of the Mammoth Company at all, and cannot be binding on the Mammoth Company.

Objection overruled.

Q. 97. Whoever wrote this, it is a fact, is it not, Mr. Metcalf, in substance?

A. Well, it seemed to me as you read it that it stated——

Q. 98. Look at it (handing volume to witness).

A. It is not exactly correct. A portion of the zinc ore was shipped to Beer, Sondheimer & Company, and not to the zinc smelters of the United States Smelting Company in Kansas.

Q. 99. Were the ores that were not shipped to Beer, Sondheimer & Company, shipped to the zinc smelters of the Company in Kansas?

A. What Company do you mean?

Q. 100. Well, whatever was meant there, what your Company [fol. 305] says. It is the fact, is it not referring now to the report of the United States Smelting, Refining & Mining Company, the parent Company, for December 31, 1914, I ask you whether this is not the fact, that in August of the year 1914, it became necessary to materially restrict the output of copper at the Mammoth mine, and this, coupled with the fall in the price of copper, which fell to 11 cents, substantially interfered with the earnings of this property; that is correct, is it not?

Mr. Sutro: That I object to as wholly immaterial. I do not know what the copper output of the Mammoth Company has to do with it.

Mr. Jerome: It has to do this, that when copper went down they began to speed up on the zinc. That is my contention and the evidence tends to show it.

The Court: I will allow it.

Mr. Jerome: That is a fact, is it not, Mr. Metcalf?

A. We reduced operations in the fall of 1914 on account of war conditions, and the low price of copper.

Q. 101. The low price of copper?

A. Yes.

Q. 102. And then you began to give more attention to the zinc output, did you not?

A. No, not——

Q. 103. I am not asking you whether it was for that reason; I am only asking you whether it happened to synchronize, these two events, that as spelter began to go up and copper began to go down, you gave more attention to zinc output, did you not?

[fol. 306] A. I am not sure whether we did or not I am not sure as to just the dates. When we found this zinc ore body, we started to develop as fast as we could, and I do not know that my personal attention to it varied particularly.

Q. 104. After you began to shut down, to diminish the usual output of copper, very shortly after that you began to increase your output of zinc, did you not?

A. Just what was the date when we began to decrease our output of copper?

Q. 105. This says, "In August it became necessary to materially restrict the output."

A. I am under the impression that a few months, just a month after that, or two months anyhow, we decreased our output of zinc.

Q. 106. And what led you to do that?

A. Why, my impression is, from my recollection, that as we developed that zinc ore body, for a while we had no market, and eventually we had a market and had a little accumulation of it, and when we got that market we shipped that ore, and the shipments became less when we used up what little accumulation we had.

Q. 107. When did you have that little accumulation, about?

A. Why, I think about the first of August, or some such time.

Q. 108. And then you went on from then and diminished your shipments, did you not?

A. Of zinc?

Q. 109. Yes.

A. I could tell by referring to some of the exhibits in the case more positively, but I think within a month or so we decreased shipments.

Q. 110. It appears in evidence here that you diminished in September, on the 10th there was tonnage settled for of 94 tons, the [fol. 307] week ending October 3rd, tonnage settled for of 48 and a fraction tons; and from that time on until December there seems to have been no large tonnage — for with Beer, Sondheimer, but during all that period spelter was below 5 cents. When spelter began to go up and increased beyond 5 cents, it would appear from the tabulations in evidence here that settlements ran up quite rapidly, and during the rest of the year of 1914, and in the early months of 1915, until the repudiation of this contract. That being what the tabulation shows, I ask you whether that production of zinc ore by your mine there, the Mammoth, had anything to do with the prices of spelter?

A. Why, there were several influences at work, Mr. Jerome. One of those influences was that while we were developing the ore, we could not ship any very considerable quantity, not until we started stoping, and we did not get ready to stope until January or February; I cannot state just exactly what the date is.

Q. 111. You had a picking plant there, did you not?

A. Yes.

Q. 112. Or separating plant?

A. Yes.

Q. 113. When did you first have that?

A. Why, we have described or there have been referred to in the depositions, two so-called picking plants. There is only one of them, though, which really could properly be called a plant. That one was completed and ready to use March 5, 1915.

Q. 114. Well, is that the one that is referred to as No. 2 sorting or picking plant?

A. Yes.

Q. 115. Well, what was No. 1 sorting or picking plant?

A. Why, I have to go into it at a little length here.

[fol. 308] Q. 116. That is all right, sir.

A. When we found this ore, we did not know whether it would be possible to separate the copper and the zinc in such shape that we could get any commercial product at all out of it, and we had tests made to determine if it could be treated in a concentrating mill, and a report was made to us that it could not be treated in a concentrating mill to advantage. Then we started in to see if we could separate the zinc from the copper by hand, so as to get two commercial products, one zinc and one copper. Well, to do this originally, we just would dump the ore on the floor, and have a man pick out by hand what looked like copper and what looked like zinc, and get these products assayed and see if we could sell the zinc and calculate whether we could smelt the copper to advantage or not. And eventually we found we probably could. And just to somewhat reduce the cost of doing that sorting, which was entirely out of all reason and prevented any possible commercial profit, we fixed up a table, or rather a frame work the height of a table, say about 3 feet wide and 10 feet long, and had men shovel the ore up onto this table and wash it off with the stream from a hose, and then pick out by hand the two materials and sort them; and that very primitive apparatus was what we called our picking plant No. 1.

Q. 117. When was that constructed?

A. I should say about July, 1914.

Q. 118. And when was it in complete operation?

A. I could not say as to that. We made improvements in it from time to time. At first we shoveled the ore on to it by hand; subsequently we fixed up a grade of plank for a runway.

[fol. 309] Q. 119. That is what you call a handpicking plant?

A. Well, they are both handpicking plants.

Q. 120. Yes, but you had no mechanical conveyor or anything of that kind?

A. No mechanical means, no.

Q. 121. And you improved on that; and when did you finally get it complete, improved, in the best working shape you had it; about what time?

A. I could not answer that.

Q. 122. You shipped ores picked on that to Beer, Sondheimer & Company, did you not, under this contract?

A. Oh, yes.

Q. 123. And you had not completed your changes and tables and improvements or whatever you want to call it, at that plant until after this contract was made, had you?

A. Why, probably not, though I am not sure.

Q. 124. Who designed your picking plant that turned out these three or four thousand tons a day or week, or whatever the period was?

Mr. Sutro: There is some difference between them.

Mr. Jerome: I am trying to identify it and not give a description of it. My knowledge of mining operations is extremely limited.

Q. 125. But you did subsequently construct another, No. 2 sorting or picking plant, that had considerable capacity, did you not?

A. Yes.

Q. 126. And that was completed when?

A. March 5, 1915.

[fol. 310] Mr. Sutro: May I say, for the sake of the record here, so that we may understand it, that it was erroneously in the first place given as February 26, 1915.

Q. 127. What was the capacity of this small picking plant, No. 1?

A. Why, I hardly know. Eventually, I think in January, we got nearly 500 tons a month off of it.

Q. 128. And what was the capacity of this big picking plant, No. 2?

A. I do not know that we ever ran that to full capacity. We probably could have got two to three thousand tons a month from it.

Q. 129. Who designed that second picking plant?

A. It was designed by our chief engineer at Kennett at the time, who, I believe, was Mr. Kremer at that time.

Q. 130. And there were blueprints of this plant prepared?

A. Yes.

Q. 131. And when were those blueprints prepared?

A. Oh, right about that time.

Q. 132. I know, but about what time, as nearly as you can place it?

A. Oh, August or September.

Q. 133. Or November or December or October, but which?

A. I said I do not know just which.

Q. 134. You are not prepared to state that there were in existence any blueprints of any such plant as that in August, 1914, are you?

A. I am not prepared to say there were or were not.

Q. 135. You are not even prepared to say there were any designs or blueprints for that in existence in October of 1914?

A. Yes, I am willing to say that there were in October.

[fol. 311] Q. 136. Well, let us go to September then; were there in September?

A. There may have been; I do not know.

Q. 137. Was there more than one set of blueprints prepared for this plant No. 2? What I am getting at is this, Mr. Metcalf; from the time of the preparation by your engineer, say as blueprints for this picking plant, was there any substantial change or variation made in those plans of that picking or sorting plant?

A. I should say no.

Q. 138. You would say there was none?

A. No.

Q. 139. I notice in these letters in evidence from you to Beer, Sondheimer & Company, making formal tender, in the first one of May 15, 1915, you say, "We have on hand 2,394 tons of zinc crude ore, running not less than 33 per cent metallic zinc, over and above the tonnage received by you for the month of April, 1915." Does that mean that apart from what you had shipped to Beer, Sondheimer & Company, and they had received, or that had been dumped

at Bartlesville and held there, you had on hand, and accumulated 2,394 tons?

A. I should say it does not mean that; that would not be my understanding.

Q. 140. What would be the meaning of that?

A. It would mean that we had on hand the tonnage named, which would include any ore which we possessed on hand, wherever it was.

Q. 141. Did you mean to include in that the amount that was on the ground, or the amount that was at Bartlesville, unaccepted?

A. Yes, that is my recollection.

I would like to explain another matter, an answer which I gave a little while ago, on which I think I may have been in error. I stated that the plans for the zinc plant were made at Kennett by [fol. 312] our Chief Engineer at Kennett, and on further thought I am not sure whether that was so or not. The United States Smelting, Refining & Mining Company maintained an engineer's office in Salt Lake City, and sometimes, for construction of that sort the designs were made there, and sometimes they were made at Kennett, and I am not able to state positively at which place it was done.

Q. 142. Let me see if I cannot refresh your recollection on that. Is it not true that sometime in the autumn of the year 1914, you were in Salt Lake City while this very picking plant No. 2 was being designed, and an interview took place there between you and Heintz or Eardley, or the engineer—of course, I do not recall who it was with—in which it was discussed as to how much ore would have to be taken by Beer, Sondheimer & Company under this contract, and the discussion having resulted in the conclusion that they would have to take as much as you would produce, take the entire product, that then the engineer was instructed to go ahead, and this very large picking plant was designed; does that refresh your recollection at all?

A. No, I do not remember anything like that.

Q. 143. After repudiation of the contract by Beer, Sondheimer & Company, these ores, the zinc ores, were shipped to the smelters of the United States Smelting Company, in Altoona?

A. Some to Iola also.

Q. 144. And some to Iola. What ores were shipped to those smelters; all your zinc ores? A. No, not quite all.

Q. 145. Well, what was not shipped to them?

A. There was a small shipment made to the United States Smelting Company at Needles, I think, of ore that was too low in grade to be applied to the Beer, Sondheimer shipments.

Q. 146. But you did ship to Iola and you did ship to Altoona, zinc ores running much less in zinc content than 33 per cent., did you not?

A. I think not much less; there may have been some a little less.

Q. 147. During the year 1915, there was an extraordinary increase in the price of spelter; an unprecedented increase, was there not?

A. Yes.

Mr. Sutro: To what time in 1915, do you refer, Mr. Jerome?

Mr. Jerome: I say during that year there was an increase.

Mr. Sutro: In March, 1915, Beer, Sondheimer & Company broke this contract. I do not see what difference it makes whether there was a rise in the price of spelter after that.

Objection sustained. Exception.

Q. 148. Did you know at the time that you entered into this contract that Beer, Sondheimer & Company had a smelting plant at Bartlesville?

A. Yes.

Q. 149. Did you know about the capacity of that plant?

A. No, I did not.

Q. 150. You knew nothing about it?

A. No.

Q. 151. Did you know that they were custom smelters?

A. Let me get clear what I am supposed to know. I know things by hearsay, and you are asking me things I know only by hearsay now. I do not know of my own knowledge.

[fol. 314] Q. 152. I mean, when you entered into this contract you went into it under the theory, and understood, and everybody understood, as a practical matter, that Beer, Sondheimer & Company were smelters?

A. Yes.

Q. 153. And they wanted zinc ores of this character to smelt and get the metallic contents out of them and sell them?

A. Yes.

Q. 154. That was ordinary information. After the repudiation of this contract, and on August 5, 1915, you wrote a letter to Beer, Sondheimer & Company, which is in evidence here, reading in part, "We have on hand approximately 5,000 tons of zinc ore product running less than 33 per cent. zinc. We hereby offer to sell you the same under the terms of our contract with you dated August 26, 1914.

"Kindly advise us promptly if you elect to accept this product because if you do not elect to accept same, we will dispose of it elsewhere." What did you do with that 5,000 tons, if you know?

Mr. Sutro: It seems to me as Mr. Stockton suggests, your Honor, it is foreign to any claim involved in this suit. I cannot see what the materiality of it is. Of course, it is perfectly apparent that it was offered to them, because under the contract they had an option on the ore running less than 33 per cent., and out of an abundance of caution at that time it was offered to them before we attempted to sell it any place else.

Mr. Jerome: We are concerned with what the Altoona and Iola smelters were being fed with, whether they were being fed with [fol. 315] ore that we were under obligations to take, or whether they were being fed with something else in part.

The Court: I will allow the question.

A. To the best of my recollection we ran that material through the sorting plant again, and by that time we had installed some jigs, so that we could make a better separation than we previously had, and we succeeded in getting from this material, material that ran higher than 33 per cent zinc, also getting a copper material that could be smelted in the copper plant.

Q. 155. So you broke them up into 33 per cent ore, and then later on set aside that 33 per cent ore, and later on charged us or entered us with a percentage of these low grade ores, or rather, ores which you had separated out from this?

A. You mean charged or tendered?

Q. 156. Tendered, I mean?

A. Yes, we tendered you that ore.

Mr. Sutro: Wait a minute; I do not understand your question.

Mr. Jerome: They completed their sorting plant by the installation of jigs, and they took those 5,000 tons of low grade ore which they tendered us, and by the utilization of this instrument called the jig, they separated it into ores which they could use to smelt copper and ores which ran over 33 per cent metallic content of zinc, and they tendered us at a later date such portion of it as ran 33 per cent or upwards in zinc.

The Witness: I entirely misunderstood your question then.

[fol. 316] Mr. Sutro: I think the last tender was before that.

The Witness: That tender was before this separation was made.

Q. 157. When you got out this 33 per cent by jigging it, or whatever you call it, when you got out this 33 per cent metallic content of zinc, what did you do with that? Did you tender it to us, or did you sell it for our account, or what?

A. Let me look at the date (examining paper). I would like to see the last tender of which we have record.

Mr. Sutro: It was August 12, 1915.

Q. 158. I am not so much interested in the question whether you tendered it or not, but what I mean is, that you got out of this 5,000 tons of a certain amount of ore that did run 33 per cent or higher in zinc content, and that ore you treated as ore we ought to take, and you sent off to your smelters and had it refined?

A. No, sir, we did not.

Mr. Sutro: I object to that as a matter which should be taken up before the Master.

Cross-examination by Mr. Sutro:

X Q. 159. Mr. Metcalf, there are a few questions I would like to ask you on cross examination. In the first place, will you kindly explain to the Court the finding of this Iola ore body, and describe to [fol. 317] the Court its extent; how big was it?

A. The ore body was about 150 feet long and 75 feet wide, and about fifty feet high.

X Q. 160. How many tons of ore, approximately, did it contain?

A. It contained about 40,000 tons.

X Q. 161. As ore bodies go, it was pretty good sized ore body, was it not?

A. It was.

X Q. 162. That was discovered at the mine early in 1914 and was called the Iola fracture or the Iola ore body, was it not?

A. Early in 1914, and it was called the Iola ore body.

X Q. 163. That was the first zinc ore body of any consequence that had ever been found in the mines, was it not?

A. It was.

X Q. 164. And the ore in that ore body was made up of copper and zinc ore?

A. It was.

X Q. 165. Now, as you mine the ore, you do it by drilling holes into the face of the ore body, and powder is put into these, or dynamite into these holes, and the dynamite is exploded, is that not right?

A. That is a portion of the operation.

X Q. 166. Well, explain to the Court in what sizes the ore then comes out?

A. The ore comes out in sizes varying from dust up to probably a foot and a half in diameter.

X Q. 167. This mine is situated up in the mountains at an elevation of about 3,000 feet above Kennett, is it not?

A. It is.

X Q. 168. And is about three or three and a half miles from Kennett, where the smelter is?

A. Yes.

X Q. 169. And the ore is then brought down by means of a gravity tram to the smelter and is crushed there is it not?

A. That is what we did with the zinc ore.

[fol. 318] X Q. 170. I am talking about this zinc ore?

A. Yes.

X Q. 171. And after it was crushed you at first put it on this zinc sorting plant No. 1, which you have described to Mr. Jerome?

A. Yes.

X Q. 172. So as to determine whether or not the ore could be separated by hand picking and sold for commercial purposes?

A. Yes.

X Q. 173. Now, will you explain to the Court the system in operation at the Mammoth Mine generally in reference to mining? That is to say, how the stoping was done, and whether or not it was necessary after you commenced stoping that ore body, to continue the stoping of that ore body and extract all of the ore until you had exhausted the particular ore body?

A. We would first run drifts up through the ore body, or raises up through the ore body, and drifts out to the boundaries.

X Q. 174. Laterally?

A. Laterally, and longitudinally also. That was the period when

we were running those drifts, that our output was very small. When we finally got the drifts run, the ore body looked blocked out, we would start in at the top of the ore body at the end of the drifts nearest the edges, and from the drifts we would mine all of this ore, gradually coming back toward our central raise, and supporting the roof of waste over the ore meanwhile by timbering. In our ordinary mining it is contemplated that we will take out this entire top slice, timbering it meanwhile, and then bore holes in the timbers, put powder in them and blast them, letting this roof come down onto a timber floor which we have previously laid at the level of the bottom of the drift from which we are working.

[fol. 319] Now, before we have taken out this ore by stoping in this way, there is no trouble about holding up the roof, because the ore itself holds it, but when we have taken out this slice of ore, the entire weight of the ground, from the bottom of our workings up to the surface, comes on this timbering, and it is so placed that it is not practical to continuously support this weight. If you try to, your timbers give way, and you have to put in new timbers continually at heavy expense, and in spite of all the new timbers that you can put in, it will gradually crush down in spite of you; and for that reason, when you once start stoping an ore body by this system, you either have to continue with it, or be put to a great additional expense in mining, and perhaps actually lose some of the ore and be unable finally to get it.

X Q. 175. So that when you had once, in January or February, 1915, as you testified on your direct examination by Mr. Jerome, started stoping and taken off a slice of the ore body known as the Iola ore body, you were obliged to continue that operation until you had exhausted the Iola ore body; is that correct?

A. That is correct. We had to do that or be put to very great expense.

X Q. 176. And the fact is that you did continue until its exhaustion.

A. We did continue until it was exhausted.

X Q. 177. And that was done in the ordinary course of your mining operations and business, was it not?

A. It was the only minerlike way to go at it.

X Q. 178. Answer my question, whether it was or not?

A. Yes.

X Q. 179. I want to show you a letter and ask you if you recognize [fol. 320] it (handing witness paper)?

A. I recognize it.

X Q. 180. While Mr. Jerome is looking at that, you stated in answer to Mr. Jerome that you were building a larger zinc plant or picking plant, and he asked you about its completion, whether or not you hurried it along. Will you state whether or not you received a letter from Beer, Sondheimer & Company, or Mr. Salinger, asking you with reference to your ore shipments, and as to whether or not the receipt of that letter had anything to do with your rushing the completion of the plant as much as possible?

A. I received—

Mr. Jerome: Wait a minute. I object to the letter as wholly incompetent. I do not think this is admissible, because there was no authority for it, as far as Beer, Sondheimer & Company were concerned. If it was introductory to some reply——

Mr. Sutro: It was introductory to a reply.

Mr. Jerome (continuing): An outsider making an inquiry and getting a reply from this witness, and then introducing this witness' reply as evidence in their own favor, it would certainly be a self-serving declaration. Salinger had no business to do anything for us except with our express authority. He got express authority from us to sign this contract.

The Court: What to do you say about Salinger?

Mr. Sutro: I say, your Honor, that your Honor admitted this morning the telegrams offered by them addressed to Mr. Metcalf, [fol. 321] signed Herbert Salinger, and that Metcalf had every reason to think that Salinger was the agent of Beer, Sondheimer & Company, held out by them as their ostensible agent. He never sent Metcalf any copy of the telegram authorizing him to inquire for this information; but Salinger inquired of Metcalf and Metcalf answered.

The Court: I will allow the letter.

Mr. Jerome: Exception.

X Q. 181. Mr. Metcalf, did you receive this letter from Mr. Salinger?

A. I did.

Mr. Sutro: I offer this in evidence.

Mr. Jerome: To which we object. Exception.

Letter marked Plaintiff's Exhibit No. 65.

X Q. 182. Did you answer that letter, Mr. Metcalf?

A. I did.

Mr. Sutro: Have you gentlemen the original letter dated January 27, 1915, from Mr. Metcalf to Mr. Salinger? If not we will use the copy.

Mr. Jerome (producing letter): Same objection.

Same ruling. Exception.

Mr. Sutro: I offer in evidence the original letter produced by counsel for defendant, dated January 27, 1915, addressed by Mr. Metcalf to Mr. Salinger in reply to Mr. Salinger's letter.

Marked Plaintiff's Exhibit 66.

[fol. 322] X Q. 183. Mr. Metcalf, Mr. Jerome asked you concerning the relation between the market for spelter and the output. Now I understand that it was your practice in the operation of the Mammoth mine—please state whether or not it is correct—that if ore had to be marketed at a loss, you would not produce it.

A. We certainly would not.

X Q. 184. Mr. Metcalf, Mr. Jerome called to your attention that

prior to the completion of the zinc plant there was a comparatively slight incidental product of this zinc ore. Now, is it not a fact that the contract provided that it was to run for a year from the date of the completion of the zinc plant, and that you built that zinc plant in order to increase the shipments as much as possible?

A. That is correct.

X Q. 185. And that until the zinc plant was ready for operation, or about ready for operation, you did not begin your stoping, because you had no place to handle the ore. A. Well, I think we began stoping a month before the sorting plant was ready for operation, in accordance with Mr. Salinger's evident anxiety for us to increase shipments to Beer, Sondheimer as much as possible.

Mr. Jerome: I move that the latter part of that answer be stricken out.

The Court: "In accordance with," and so on, motion granted.

X Q. 186. Mr. Jerome asked you about the United States Mining Company selling zinc ore. Did the United States Mining Company ever make any contract for the sale of any product or output of the Kennett properties, of which you were manager without your [fol. 323] authority and consent?

A. They never did to my knowledge and no action was ever taken in accordance with any such thing.

X Q. 187. You never shipped any ore or product from Kennett, so long as you were manager, on any contract, except it was made with your authority and consent; is that a fact?

A. No, that is a fact.

X Q. 188. Will you state whether the particular contract here under consideration was submitted to you for approval, and whether or not you discussed its terms with Mr. Anderson, the General Manager of the Mammoth Company in California, before you authorized Mr. Eardley to proceed with it, and before you executed it?

Mr. Jerome: I think that has already been testified to, that he did, and that Mr. Anderson not only told him he approved of it, but subsequently initialed it.

Mr. Sutro: Very well.

X. Q. 189. The relations between your Company and the United States Smelting Company, so far as your operations were concerned, that is to say, so far as your seeking to get the best market for the Mammoth plant, were the same as if you were dealing with a stranger, were they not?

A. Yes.

X Q. 190. That is to say, you wanted to make the best showing possible for Kennett or the Mammoth plant, just as the gentlemen in charge of the United States Smelting Company wanted to make the best showing they could for that plant?

A. I did.

X Q. 191. Mr. Jerome asked you whether or not you sold this [fol. 324] zinc ore to the Altoona and Iola smelters. Will you look at this letter and say whether or not you received it?

A. I did.

Mr. Sutro: I offer in evidence a letter dated Kansas City, July 21, 1915, from W. H. Eardley to Mr. G. W. Metcalf, General Manager Mammoth Copper Mining Company.

Marked Plaintiff's Exhibit No. 67 and read to the Court.

X Q. 192. Did you accept that?

A. I did.

X Q. 193. And were the ores in question shipped to the United States Smelting Company and settled for, in pursuance to the arrangement stated in that letter?

A. They were.

X Q. 194. I show you two other letters from Mr. Eardley to yourself, dated respectively March 8th and March 20, 1916, and ask you whether or not you received those?

A. I did.

X Q. 195. And acted upon them?

A. And acted upon them.

Mr. Sutro: I offer these letters in evidence. The first is dated March 8, 1916, from Kansas City, on the letterhead of the United States Smelting Company, from Mr. W. H. Eardley to Mr. Metcalf, on the subject of the modification of the terms for the treatment of that ore as contained in the letter of July 21, 1915.

Marked Plaintiff's Exhibit No. 68.

Also a letter dated March 20, 1916, from Mr. Eardley to Mr. [fol. 325] Metcalf, containing a further modification concerning the treatment of those same ores.

Marked Plaintiff's Exhibit No. 69.

X Q. 196. Mr. Jerome asked you if the credits for the ore that was shipped to the Kansas Smelter were made on the Boston books to the Mammoth Company. Can you state how much they were?

A. I can, by refreshing my memory from a memorandum.

X Q. 196½. Well, how much were they?

A. (To be supplied.)

X Q. 197. Mr. Metcalf, was any ore running less than 33 per cent. of zinc included in the amount with which we have charged Beer, Sondheimer & Company, to the best of your information and belief?

A. Yes; there was one car.

X Q. 198. Has that been deducted in the figures?

A. Not yet.

X Q. 199. An allowance for that will be made?

A. Yes.

X Q. 200. Mr. Jerome asked if you knew that Beer, Sondheimer & Company had a smelter at Bartlesville, and you said yes. That was operated by Beer, Sondheimer & Company under the name of the National Zinc Company, was it not?

A. That was my understanding.

X Q. 201. And you also knew that Beer, Sondheimer & Company would take all the ore it could get under this contract for this smelter, did you not?

Mr. Jerome: No, he would not have known that. The contract [fol. 326] itself, if it be a contract, shows that they had a right to divert it to any other smelter, or to any other point.

X Q. 202. You knew that Beer, Sondheimer & Company would take all the ore it could get under this contract, did you not?

Mr. Jerome: That is objected to as irrelevant, and thoroughly incompetent, what was in the mind of Beer, Sondheimer & Company, what they would take. They would take what they were obliged to take under this contract, and they would not take any more. I object to the question.

Objection overruled. Exception.

A. It is my understanding that they wanted all of it that we could produce.

Mr. Jerome: I move that the answer be stricken out. It is perfectly clear that that cannot be in any way binding or relevant. It cannot affect Beer, Sondheimer & Company.

Motion granted.

X Q. 203. Mr. Metcalf, will you state to the Court whether or not it is a fact that if the price of spelter got below a point at which it would be unprofitable for you to mine, produce and ship zinc ore, you did not produce it?

A. We certainly would not intentionally.

X Q. 204. There are telegrams in evidence here, Mr. Metcalf, from Mr. Salinger to yourself, the first asking you to state what [fol. 327] you expect your zinc tonnage to be for October, 1914, and your estimate for November, and you say, "The zinc ore tonnage depends altogether on market price of spelter." Will you please explain what you meant by that reply?

Mr. Jerome: That is objected to as incompetent. The telegram speaks for itself; it is unambiguous.

Objection overruled.

A. I meant by that reply that I would go just as far as I could to meet the wishes of Beer, Sondheimer & Company in increasing the shipments, but that I was not willing to incur a great big expense, loss, in doing so.

X Q. 205. That is to say, if the market price of spelter was such that you could not mine at a profit, you were not going to mine, produce and ship?

A. No.

X Q. 206. And that is the same explanation for your telegram of October 26th:

"With spelter quotations below five, shipments will be very low. If it rises above five will probably ship about two hundred tons per month."

A. Yes.

X Q. 207. Mr. Metcalf, when the big picking plant was completed,

call it, to take care of your timbers and something, if the shipping of the stuff would have been at a loss, you would not have shipped either would you?

A. Why, we might under those circumstances. It would depend upon what caused the greatest loss.

R. R. D. Q. 222. But you did not consider at any time, as I gather, that you were under any compulsion to produce a certain amount or ship a certain amount, but that it depended upon whether it would be more or less profitable; is that not so?

A. Well, we considered that anything that we did produce, we would have to ship.

The Court: This is nothing but an argument, and he has repeated his position two or three times.

[fol. 332] GEORGE W. HEINTZ, a witness called in behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Jerome:

Q. 1. Mr. Heintz, what was your occupation in the years 1914 and 1915?

A. General Manager of the United States Smelting Company.

Q. 2. And your headquarters were in Salt Lake City, Utah?

A. Yes.

Q. 3. And you also had a certain relation to this group of corporations in the United States Smelting, Refining & Mining Company, and to the Mammoth?

A. No, sir.

Q. 4. Are you positive about that? I show you what purports to be the Ninth Annual Report of the United States Smelting, Refining & Mining Company for the year ending December 31, 1914, and direct your attention to the upper part thereof, and ask you if you desire to correct that answer?

A. No, sir, I do not desire to correct it.

Q. 5. Were you not General Traffic Manager at that time for the United States Smelting, Refining & Mining Company?

A. I beg your pardon; as Traffic Manager I was, but not as an operating official; and ostensibly only as Traffic Manager, I did not do any of the work.

Q. 6. What is it that you were General Manager of?

A. Those subsidiaries that were mentioned there.

Q. 7. You were General Manager of the United States Smelting Company and the Eureka Mining Company, and the Richmond Eureka Mining Company?

A. Yes, sir.

[fol. 333] Q. 8. And you were Intermountain Manager of the United States Smelting, Refining & Mining Exploration Company?

A. Exploration Company, yes, sir.

Q. 9. Now, as Traffic Manager of this parent Company, you were

an officer and came in contact with all these subsidiary companies, did you not?

A. Officially, yes, but as I say, not actively.

Q. 10. Your relations to the United States Smelting Company what were those?

A. In active charge of the operations.

Q. 11. And you had associated with you there as a subordinate, W. H. Eardley, did you not?

A. Yes, sir.

Q. 12. And Mr. Eardley was in charge of the buying and selling of ores for the United States Smelting Company, a subsidiary of this United States Mining, Smelting & Refining Company?

A. Yes, sir.

Q. 13. On account of his location, he was given authority to buy and sell the ores for other western subsidiaries of this parent Company, including the Mammoth Company?

A. I wish to correct that by stating that my intent in that answer was that he was given the authority to negotiate, not to close any contract for the Mammoth Company.

Q. 12. Well, let me see. When you were examined by deposition, when it was not known, I presume, whether you would be here or not—

A. I did not intend to be here.

Q. 13. It is true at that time that your recollection was in answer to the question,

"Was Mr. Eardley connected with the Mammoth Copper Mining Company,"

[fol. 334] it is true that your then—

Mr. Sutro: What are you reading from?

Mr. Jerome: I am reading from the deposition of Mr. Heintz, page C-51.

Mr. Sutro: It is cross examination.

Mr. Jerome: Yes.

Q. 14. You were then, of course, testifying as a witness, and when you testified before and are testifying now, you testified to the best of your present recollection, you understand, did you not?

A. No, I assume if that question was put and my answer is there as you read it, that it was a mistake.

Q. 15. Let me ask you, when you were asked this question, "Was Mr. Eardley connected with the Mammoth Copper Mining Company," when you gave the answer that I am about to read, that answer was the best of your then recollection, was it not?

A. No, sir, my reply—

Q. 16. It was not your best recollection at that time?

A. It was an error in the reply, and not my intent.

Q. 17. Well, now, you read this deposition over before you signed it?

A. Yes, sir, and it did not occur to me that I was stating that he was authorized to close for them.

Q. 18. What I am trying to get at is this, Mr. Heintz; I am not saying that you are not correct, I am not saying that you are correct in saying that that is an error; I am only interrogating you at this stage as to this point: When you so testified there, that was the best of your then recollection.

[fol. 335] Mr. Sutro: I submit, your Honor, that this is not material.

Q. 19. Was it or was it not?

A. No, sir, it was not.

Q. 20. So that you had a better recollection at that time, but you did not give it to us?

A. I did not intend to make any such reply.

Q. 21. But you did make this statement, did you not, in answer to that question:

"A. Only to the extent that he was in charge of the buying and selling of ores for the United States Smelting Company, another subsidiary of the same parent Company, and on account of his location he was given the authority to buy and sell the ores for the other western subsidiaries, including the Mammoth.

"Q. And that is true, is it, of a period from August, 1914, on?

"A. Yes.

"Q. And was that true before August, 1914?

"A. Yes.

"Q. Say from the beginning of 1914?

"A. I think so."

A. Yes, sir. May I go on? I should have qualified that, that Mr. Eardley had no authority to close contracts even for the United States Smelting Company; he had no authority——

Mr. Jerome: I know, but you did say——

Mr. Sutro: Let him finish, please, Mr. Jerome.

[fol. 336] A. (continued). —to contract and close for the United States Smelting Company.

Mr. Jerome: I object to this as irrelevant.

The Court: Why not let him put it in now? They will bring it out on the other side.

Mr. Jerome: All right, go on. Anything more?

The Witness: Yes.

Mr. Jerome: Well, go on with it.

A. (continued.) I was about to continue, that Mr. Eardley had no authority, and I intended not to convey any different opinion or answer in that deposition, no authority to contract to buy or sell ores for the United States Smelting Company, except with the approval and the contract signature of the manager of the United States Smelting Company, and had the same authority for the Mammoth Com-

pany, subject to the Mammoth Company's manager's approval and execution of the contract, and he made none for either company without the execution by the manager of that company.

Q. 22. Now you meant to say all that at that time, did you?

A. Well, I mean to clarify it now; I should have said it then.

Q. 23. But you did not say it then?

A. No, I did not say it then.

Q. 24. And you did say then, that Eardley was given authority to buy and sell the ores for the other western subsidiaries, including the Mammoth, did you not?

[fol. 337] Mr. Sutro: I submit, your Honor, that the answer is there.

A. I apparently did; that is self-evident, Mr. Jerome.

Q. 25. And you read it over?

A. And I want to qualify it.

Q. 26. You read it over afterwards?

A. Yes.

The Court: He said so before.

Q. 27. And you signed it and you swore to it?

A. Yes, sir.

Q. 28. What powers did Eardley have there?

A. He had the power to contract by negotiation and submit contracts and negotiations to the managers of those two subsidiaries that I mention.

Q. 29. Well, did Eardley ever contract for any of these western subsidiaries in the sale of ores?

A. Oh, yes.

Q. 30. What?

A. That is, subject to approval.

Q. 31. Did he ever contract without its being approved?

A. Not that I know of.

Q. 32. Did Eardley contract with Beer, Sondheimer & Company?

A. He negotiated, yes.

Q. 33. And when he took up these negotiations with Beer, Sondheimer & Company, from what source did he derive his authority?

A. From the manager of whomsoever he was contracting for.

Q. 34. That is, when he took them up, at the time that Eardley took up these negotiations, had he specific authority from Metcalf or Anderson or any of the officers, of Mammoth?

A. Yes, sir, that is my understanding.

[fol. 338] Q. 35. Which officer?

A. My understanding was that he had authority from Mr. Metcalf.

Q. 36. I do not want your understanding; I want your recollection as to facts; what officer?

A. My recollection is that he had authority from Mr. Metcalf to negotiate.

Q. 37. He had authority from Mr. Metcalf prior to August 26, had he?

A. If that is the date on which the contract was——

- Q. 38. That is the date of the contract.
 A. Yes, sir. It would be my recollection that he had authority.
 Q. 40. You signed the contract as a witness?
 A. Yes, sir.
 Q. 41. Well, do you not know whether he had authority and who gave it to him?
 A. Do I not know whether Mr. Eardley had authority or not?
 Q. 42. Yes.
 A. Yes.
 Q. 43. Prior to that time?
 A. He had authority from Mr. Metcalf.
 Q. 44. You remember now distinctly?
 A. To the best of my recollection.
 Q. 45. How was it given, orally or in writing?
 A. I could not tell you that.
 Q. 46. Where was it ever given?
 A. I could not tell you that.
 Q. 47. Why do you remember it so clearly? How do you fix it in your mind?
 A. Well, I can fix that upon the assumption that he would not go to work and try to sell the Mammoth Company's product without authority.
 Q. 48. So it is a matter of inference, and not a matter of recollection; is that it?
 A. Well, I know in a general way that Mr. Eardley was meeting Mr. Metcalf at various times, to draw that inference, Mr. Jerome, [fol. 339] and I think without any imputation upon what I am saying.
 Q. 49. Who negotiated the contract with the American Metal Company and the United States Smelting Company?
 — Mr. Eardley.
 Q. 50. Did he have authority?
 A. He had authority from me to negotiate that.
 Q. 51. You knew all about its going on?
 A. Yes, sir.
 Q. 52. And when was that negotiated?
 A. I could not tell you offhand.
 Q. 53. Does this refresh your memory (handing witness contract)?
 A. I could not remember. There were thousands of contracts.
 Q. 54. Was not the contract of the American Metal Company, copy of which I show you, prior to the contract between Beer, Sondheimer & Company and Mammoth?
 A. I understand so, yes.
 Q. 55. And you executed that contract yourself?
 A. This one?
 Q. 56. Yes.
 A. Yes, sir.
 Q. 57. The American Metal Company contract?
 A. Yes, sir.
 Q. 58. On behalf of the United States Smelting Company?

A. Yes, sir.

Q. 59. Who drew the text of the Beer, Sondheimer contract?

Mr. Sutro: I object to that on the ground that it is immaterial.

A. I could not tell you.

Mr. Sutro: It does not make any difference.

The Court: He says he cannot tell.

[fol. 340] Q. 60. Was it not prepared, at any rate, in the west?

A. Yes.

Q. 61. I mean it was prepared by your people, and not by Beer, Sondheimer?

A. I could not tell you that.

Q. 62. Who prepared the United States Smelting Company contract with the American Metal Company?

Mr. Sutro: I object to that on the ground that it is immaterial.

Q. 63. You executed, though, the American Metal Company contract?

A. Yes, sir.

Q. 64. And Eardley negotiated it?

A. Yes, sir.

Q. 65. And Eardley negotiated the Mammoth-Beer, Sondheimer contract?

A. Yes, sir, I think so.

Q. 66. And you knew about it?

A. In a general way, yes.

Q. 67. And when you put your name to it as a witness, you knew that there was extant this contract with American Metal Company, did you not?

A. I do not recall whether I knew that at the time or not. Mr. Jerome, I sign many, many contracts that I do not even read.

Mr. Jerome: I have no doubt about that. I am not trying to quarrel with you about that.

Now I offer in evidence this contract between the United States Smelting Company and the American Metal Company. A copy of this contract is produced by the American Metal Company under subpoena. The original is on its way, they telegraphed for the [fol. 341] original, and the original is on its way, and this is subject to correction.

Mr. Sutro: We submit, your Honor, that it is entirely irrelevant and immaterial. It is a contract between parties who are not in any sense connected with this action. It does not relate to any issue in the case.

Objection overruled.

Marked Defendant's Exhibit S.

Q. 68. Let me call your attention to the clause, "product," here, where it says: "The product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide

middlings, shipped from Midvale, Utah, Kennett, California"—that zinc stuff there at Kennett, California, only refers to zinc, ore or that kind, of the Mammoth Copper Company at Kennett, California, does it not.

A. No, the Mammoth Copper could not have shipped its ore under this contract.

Q. 69. Please do not construe it, because that is what the Court is here for. I only ask you what, if it does not refer to the zinc ore from Kennett, California, belonging to the Mammoth Company, what ore does it refer to?

A. It refers—

Mr. Jerome: I was asking you about a particular clause.

Mr. Sutro: Let him answer, and explain his answer.

A. (Continuing:) I was going to say that this contract did not cover—

Q. 70. I did not ask you that. I am calling your attention specifically, right there in that line, those three lines (indicating), [fol. 342] "the product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings shipped from Midvale, Utah, Kennett, California." Does that Kennett—

Mr. Sutro: Read the rest of it, Mr. Jerome. That is not a fair question.

Q. 71. (Continuing:) "Or any other point;" "shipped from Midvale, Utah, Kennett, California, or any other point, by or under the control of the seller, during the period of this agreement."

Now, does that Kennett, California there, and those zinc ores taken in conjunction, does that refer to zinc ores of the Mammoth Company, produced by the Mammoth Company?

A. It does not, as I was trying to tell you two or three times.

Q. 72. Then why did you not say so?

A. I did try to tell you, and you did not give me an opportunity.

Q. 73. Were there any other zinc ores produced at that time in Kennett, California, except by the Mammoth?

A. Yes, there were zinc ores near Kennett, but not by the Mammoth Company.

Q. 74. Did that refer to zinc ores produced in Kennett but not by the Mammoth Company?

A. That referred, as it says here, to any ores, any zinc ores that the United States Smelting Company might buy or control in Kennett or Midvale or any other point in the United States.

Q. 75. They might buy them from Mammoth?

A. They might, I presume.

Q. 76. And they might buy them from Mammoth at the mouth of the Mammoth mine, might they not?

A. They might.

[fol. 343] Q. 77. Yes. Now, will you tell me what other zinc ores there were at Kennett, California, except Mammoth? Whose were they, and where were they at that period?

A. I cannot think of the name of the only zinc producer that I recollect, but it was at Anderson or Ingot, California.

Mr. Sutro: Ingot is right, the Afterthought mine.

Q. 78. That was not Kennett, was it?

A. Well, it is near Kennett.

Q. 79. Oh, yes, but was there any zinc produced——

A. It says, any other points.

Q. 80. Was there any other producer of zinc ores in Kennett, Shasta County, California, at that time?

A. No.

Q. 81. Except Mammoth?

A. No, not that I know of.

Adjourned to Monday, June 14, 1920, at two o'clock P. M.

Monday, June 14th, 1920—2 p. m.

(It is stipulated that in case of objection taken and adverse ruling by the Court, the party considering himself aggrieved by the ruling, shall be deemed to have taken an exception and that same appear in the record.)

Mr. Sutro: I particularly refer to pages 21, 22, 23, 27, 48, 49, 60 and 88.

[fol. 344] GEORGE W. HEINTZ, witness on behalf of the defendants, recalled, further testified as follows:

Cross-examination by Mr. Sutro:

X Q. 82. Mr. Heintz, in answer to a question from Mr. Jerome, and which in your examination, transcription of the testimony, appears on page 88, you stated that the Mammoth Copper Mining Company could not have shipped ore under the so called American Metal Company contract, Defendant's Exhibit S, that has been offered in evidence. Now, will you kindly state to the Court your reasons for your answer, just very briefly, so the Court may understand?

A. Because the American Metal Company contract was a contract with the United States Smelting Company, which did not hold nor control the Mammoth ore.

X Q. 83. That contract does not contain any provision for payment for copper in the order, does it?

A. It does not.

X Q. 84. And the Kennett ores were distinctly zinc and copper ores, were they not?

A. Yes.

X Q. 85. And all ore shipped from Kennett was paid for as well for the copper as the zinc contents?

A. Yes, sir, that is what I understand.

X Q. 86. I show you a letter, dated July 23rd, 1914, from the United States Smelting Company, signed by George W. Heintz H, and ask you if you recognize that (showing paper to witness)?

A. Yes, I have seen this in the file.

X Q. 87. And in connection with that I want to show you a letter from—another letter, and ask you if you have seen that (handing paper to witness)?

A. Yes, sir, I have also seen this in the file.

[fol. 345] Mr. Sutro: I now offer these two letters in evidence, if your Honor pleases. The first is a letter from the United States Smelting Company to the American Metal Co., Ltd., dated July 23rd, 1914.

Mr. Jerome: Both of these letters are objected to because both these letters taken together have no reference at all, so far as the letters appear, nor do they relate to Kennett ores, and they are certainly self serving declarations—letters of the United States Smelting Company and the American Metal Company.

Mr. Sutro: Your Honor, they have offered a contract in evidence they claim covers the ores in dispute, and we are going to show by contemporary declarations between these two parties that it is not that ore.

The Court: I will allow it.

Mr. Jerome: Exception.

(Letters respectively marked Plaintiff's Exhibits 70 and 71, of this date.)

Mr. Sutro: I offer in evidence letter dated July 15th, 1914, from the United States Smelting Company to the American Metal Company, and I will ask Mr. Heintz—

X Q. 88. Mr. Heintz, regarding these letters, and the ore and product therein mentioned, will you state, if you know, to what they have reference?

Mr. Jerome: This letter is dated July 15th, 1914, and it describes it as one of their properties, and says "the terms we have arranged with your company do not show any payment for copper." Now, [fol. 346] the terms they have arranged with this American Metal Company, as it appears by the contract in evidence, did not make any arrangement for payment for copper, but it covered 800 tons—covered up to the extent of 800 tons, all the Kennett ores and all the Midvale ores, and it provided in addition to that an option to the American Metal Company of taking everything else, tailings, concentrates, crude ore and everything else. Now, I do not see where there is any relevancy in these. It is a self serving declaration.

The Court: I think you ought to show it by asking some kind of analytical questions and not mere conclusions.

X Q. 89. Mr. Heintz, was there any zinc product other than the one coming from the Mammoth mine at Kennett, California, which

the ore selling department of the United States Smelting Company had under negotiation for sale in July, 1914?

A. I don't think there was any.

X Q. 90. Referring to the ore and the product mentioned in the two letters, of July 15th and July 23rd, 1914, to the American Metal Company, which I have shown you, what product and what ore is referred to in these two letters? What is the product and what is the ore?

Mr. Jerome: That is objected to as mere conclusion of the witness.

The Court: Sustained: I think your former question covered that as far as it can cover it.

[fol. 347] Mr. Sutro: Very well, sir.

X Q. 91. Mr. Heintz, after the breach or the refusal by Beers, Sondheimer & Company to take ore under this contract with the Mammoth Company had taken place, there were negotiations between Beers, Sondheimer & Company and the Mammoth Company looking to a settlement of the controversy between them, were there not?

A. Yes, sir.

X Q. 92. Now, I call to your attention, Mr. Heintz, the language of this contract of June 10th, 1914, between the United States Smelting Company and the American Metal Company: "The product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller during the period of this agreement." Did the United States Smelting Company have any control over the ores of the Mammoth Copper Company, at Kennett?

A. No.

X Q. 93. Could you have sold or contracted for the sale by the United States Smelting Company of any of those ores without the approval or ratification of Mr. Metcalf?

A. No, sir, not of the Mammoth Company.

Redirect examination by Mr. Jerome:

R. D. Q. 94. Now, as a matter of fact, the relations of these companies were such that the authority of Mr. Lyon, who was vice president of both companies, in charge of operations, would have been sufficient for Mr. Metcalf or any body else in charge of the subsidiary, would it not?

A. Yes, sir.

[fol. 348] R. D. Q. 95. As I understand it, you say that this ore referred to in these letters Mr. Sutro has just put in evidence referred to Kennett ore?

A. Yes, sir.

R. D. Q. 96. And what is the difference between crude zinc sulphide ore and zinc sulphide concentrates?

A. A concentrate is a product of the crude ore.

R. D. Q. 97. But zinc crude ore and zinc concentrates are two very different things, are they not?

A. They have the same origin; one is——

R. D. Q. 98. When you take it out of the mine and it has got 33½ per cent in it of zinc, in the portion that you have separated, that in crude zinc sulphide ore, is it not?

A. Yes, sir.

R. D. Q. 99. How would you turn that into concentrates—what process?

A. Crush it and put it over a concentrating table.

The Court: Magnetic or what?

The Witness: No, gravity.

R. D. Q. 100. It is treated by water and separated out by gravity?

A. Yes, sir.

R. D. Q. 101. And after concentration, the concentrates have a much higher metallic content than the crude ore?

A. Precisely.

R. D. Q. 102. And at the time that you entered into this contract with the American Metal Company, you had a mill at Kennett, did you not?

A. Not that I know about.

R. D. Q. 103. When did you first put a mill up at Kennett for making concentrates?

A. I do not believe they ever had one, but I am not sure.

[fol. 349] R. D. Q. 104. You do not think they ever had one?

A. A concentrating mill.

R. D. Q. 105. The machinery, the mechanism, call it what you please, Mr. Heintz, by means of which you converted crude ore into concentrates?

A. I do not know of any there.

R. D. Q. 106. Never had any apparatus of that kind?

A. I had nothing to do with the Mammoth Company, and I do not know that they had it.

R. D. Q. 107. You did not know about Mr. Metcalf installing jigs, did you?

A. I do remember some jigging.

R. D. Q. 108. And jigs are instruments or machinery which pertain to the making of concentrates, are they not?

A. Well, one class of concentrates.

R. D. Q. 109. Well, the kind of concentrates that went out of Kennett, are they not?—I will withdraw the question.

R. D. Q. 110. How many years have you been connected with smelters and mines?

A. About fifteen.

R. D. Q. 111. And you have heard and know what a jig is in mining parlance?

A. Yes, sir.

R. D. Q. 112. What do they do with a jig?

A. It is for gravity concentration, putting ore into the crusher or before it is separated out on tables.

R. D. Q. 113. And now that your memory is refreshed, you do think you heard something about jigs being installed at Kennett?

A. Only incidentally; I was never there to see it, and I really have no knowledge of my own that they did.

R. D. Q. 114. And in July, on July 15th, 1914, you were in charge of the United States Smelting Company, were you not?

A. Yes, sir.

R. D. Q. 115. As the date of this letter to the American Metal Company shows; and you say this letter refers to the Kennett ores? [fol. 350] A. That is my understanding, that that letter refers to Kennett ores.

R. D. Q. 116. Unless there was a concentration plant in Kennett at that time, whether with or without jigs, did you allow a letter to go out to this effect "there is a possibility of shipping from one of our properties several thousand tons of zinc sulphide concentrates"—I understood you to tell Mr. Sutro—

Mr. Sutro: One minute. Which question stands? You asked him "why did you allow that letter to go out?"—

Mr. Jerome: Take that. Can you tell me?

A. I couldn't tell you.

R. D. Q. 117. I understood you to tell Mr. Sutro that you were cognizant of this letter, July 15, 1914, and that the ores in it refer to Kennett ores?

A. I said I had seen—

Mr. Sutro: Just a minute, if you please. That is not the letter he told me he was cognizant of. The letter he told me he was cognizant of is dated July 23rd, 1915, and is over his signature.

Mr. Jerome: Will you let me have that, please?

(Exhibit 70 handed to Mr. Jerome.)

R. D. Q. 118. Did you ever see that letter (showing letter to witness)?

A. I think I seen it in the file.

R. D. Q. 119. Yes. And at that time were there concentrating apparatus?

A. I could not tell you.

[fol. 351] R. D. Q. 120. When you saw a proposition to sell several thousand tons of concentrates, did it make any impression on your mind at all?

A. They may have had some done; I did not know anything about it, concentrating the ore.

R. D. Q. 121. Did you make any inquiries of Mr. Eardley when you saw this in the file?

A. It is six years ago; I do not recall the details of that transaction.

R. D. Q. 122. You note that this letter is July 15th, isn't it?

A. I notice that, yes.

R. D. Q. 123. Now, on July 23rd, you wrote this letter, did you not?

A. No, sir, apparently not.

R. D. Q. 124. Look at it; it is signed by you?

A. It is signed by me per someone else.

R. D. Q. 125. Have you the original here?

Mr. Sutro: You have a copy which shows it was not. It was signed by Mr. Heintz per "H."

R. D. Q. 126. Who is "H"?

A. Mr. Howard of Mr. Eardley's office.

R. D. Q. 127. And you notice also "the ore referred to in our letter of the 15th inst."—this is the one—"it is a concentration proposition;" and concentration proposition refers to a proposition dealing with concentration, does it not?

A. Yes, sir.

R. D. Q. 128. Is there anywhere mentioned in the first letter, of July 15th, 1914, anything about crude zinc ore?

A. I see nothing here.

R. D. Q. 129. Anything in there that you could call crude zinc ore?

A. No.

R. D. Q. 130. I hand you now the original—our original contract that you witnessed between Mommouth Copper Mining Company of [fol. 352] Kennett and Beers-Sondheimer & Company, and ask you if the words, in the definition of product, "and concentrates" were not stricken out of there before execution?

A. I could not tell you that.

R. D. Q. 131. Don't you see the initials on the side?

A. I see initial- HS.

R. D. Q. 132. "HS"?

A. "HS," and the words "and concentrates" stricken out. I do not know when it was done.

R. D. Q. 133. So that after all, these communications, just now put in evidence, do not refer to crude zinc ore at all, do they?

A. Not those you just showed me, they do not.

R. D. Q. 134. Well, Plaintiff's Exhibit 70 and Plaintiff's Exhibit 71, do not refer to crude zinc ore at all, do they?

A. This one from our office does not, but the answer speaks of copper contained in zinc ores and concentrates.

R. D. Q. 135. But your proposition, what emanated from you, referred to concentrates alone?

A. Seemingly, yes, sir.

R. D. Q. 136. And also this other letter that I showed you—did you not put that in evidence, Mr. Sutro?

Mr. Sutro: No.

Mr. Jerome: We will offer it in evidence in connection with the letters you put in evidence, as referred to in the letter of July 23rd.

Received and marked Defendant's Exhibit T, of this date.

[fol. 353] R. D. Q. 137. You do not mean to say, Mr. Heintz, do you, that you were not cognizant of this?

A. I have seen that in the file.

R. D. Q. 138. Did you not see it? Did not Eardley consult with you at the time?

A. Probably did, but I cannot say that he showed me that actual letter, six years ago. It is a detail in a large business.

R. D. Q. 139. When was it that you left the United States Smelting Company and went to take charge of the smelters that they had acquired in Altoona—oh, that was Mr. Eardley, pardon me, Mr. Heintz.

GEORGE METCALF, a witness, recalled by the defendant, having been previously sworn, further testified as follows:

Redirect examination by Mr. Jerome:

R. D. Q. 223. Will you please tell me, Mr. Metcalf, when the Mammoth at Kennett constructed or acquired apparatus for making concentrates?

A. Why, the first part of the apparatus, about the 10th of March, 1915.

R. D. Q. 224. 1915?

A. Yes, and probably had it in working order about the end of March or the early part of April.

R. D. Q. 225. And prior to that they had no—

A. No concentrating apparatus of any sort.

Recross-examination by Mr. Sutro:

R. C. Q. 226. In that connection, Mr. Metcalf, I would like to ask you whether in June and July, 1914, when the zinc proposition at [fol. 354] Kennett was first mentioned, whether or not you had in mind shipping that zinc as concentrates possibly, or as crude ore?

Mr. Jerome: That is objected to as wholly irrelevant. It was before the contract.

The Court: I will allow it.

Mr. Jerome: Exception.

A. We expected at that time to be able to concentrate that ore and ship it as concentrates, but we had tests made by people whom we thought were competent, and they reported that we could not concentrate the ore, and then we developed this method of sorting or picking the ore which was actually used. Subsequently we ourselves, in March, 1915, found that it could be concentrated in a measure, and after that time used such apparatus in conjunction with our sorting plant.

R. C. Q. 227. Had you, in July, 1914, asked Mr. Eardley to see if he could find an outlet for the zinc ore, or to handle the concentrates or crude zinc ore?

A. I had.

Redirect examination by Mr. Jerome:

R. D. Q. 228. When did you ascertain that this ore would not concentrate well under the methods that you then had in contemplation?

A. I do not remember the exact date, I can only place it by reference to the date of our contract with Beer-Sondheimer, that it was some time prior to that.

R. D. Q. 229. After you had established your picking plant No. 2, and had put in concentration apparatus, did thereafter you ship [fol. 355] crude zinc ore or concentrates?

A. Do you mean when we shipped to the United States Smelting Company or Beers-Sondheimer?

R. D. Q. 230. United States?

A. There were some concentrates included in the shipments to the United States Smelting Company.

R. D. Q. 231. So that all the zinc ore, the crude zinc ore, that you produced, did not go out from Mammoth as crude zinc ore, but part went out as concentrates?

A. Yes, that is true, after Beers-Sondheimer refused the ore, and we had to——

R. D. Q. 232. That is what I am getting at, these smelters at Altoona, that belonged to the United States Smelting Company, they were fed concentrates as well as crude zinc ore?

A. There was practically no difference between the concentrates which we produced at Kennett and the product of our sorting plant, except the matter of size.

R. D. Q. 233. But as a matter of fact——

Mr. Sutro: Let the witness finish. You want the facts, do you not?

The Witness (continuing): So there was no advantage in keeping the two products separate in shipping to the United States Smelting Company; they were willing to take both.

R. D. Q. 234. I am not discussing that point, Mr. Metcalf; but as a matter of fact, after the repudiation of Beers, Sondheimer & Company, what you shipped to your smelters was mostly concentrates?

A. No, it was not.

[fol. 356] R. D. Q. 235. Well, how large a proportion?

A. We shipped, I think, nine or ten thousand tons, and I think 329 tons of that was concentrates.

R. D. Q. 236. And no more?

A. And no more.

HERBERT SALINGER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Jerome:

Q. 1. Where do you live, Mr. Salinger?

A. Salt Lake City.

Q. 2. And in the year 1914, were you residing in Salt Lake City?

A. I was.

Q. 3. What was your occupation?

A. I was special representative of Beers, Sondheimer & Company.

Q. 4. And did you, in the year 1914, negotiate on behalf of Beers, Sondheimer & Company and send to them for ratification and approval the contract here in suit, between the Mammoth Copper Mining Company and Beers, Sondheimer & Company?

A. I did.

Q. 5. And with whom, representing the Mammoth Copper Mining Company, did you negotiate?

A. Mr. Eardley.

Q. 6. How long a period, about, did your negotiations with Mr. Eardley extend over before the contract was drawn up in typewritten form?

A. About six weeks.

Q. 7. And when it was finally drawn up in typewritten form, who prepared it?

A. Mr. Eardley.

[fol. 357] Mr. Sutro: Just a moment. I do not see that that makes any difference. There is nothing ambiguous in the contract.

The Court: I will allow it.

Mr. Sutro: Exception.

Q. 8. It was prepared and Mr. Eardley produced it in typewritten form, substantially in the same form that it here appears, save and except such interlineations and erasures as may there appear?

A. Yes.

Q. 9. Then the contract, as I understand it, was sent on to Beers, Sondheimer & Company, and was executed by them, and you and Eardley exchanged them?

A. No, there was an original draft made by Mr. Eardley and I sent that on to New York, and it was not entirely satisfactory in some instances, and I believe that the New York office rewrote it and sent it back to me, and I am not certain whether that was the copy that was finally signed or whether it was rewritten in Mr. Eardley's office and then a copy substantially as agreed upon was signed.

Q. 10. Now, had you any talk with Mr. Eardley or with Mr. Heintz before the execution and delivery of that contract in reference to the production of zinc ores, crude zinc sulphide ores, from Kennett?

A. I did.

Q. 11. Will you state those conversations, the substance of them, to the best of your present recollection?

Mr. Sutro: Now, if your Honor pleases, I submit, under the well [fol. 358] recognized rule, in this Court, the very case of Hustis against Beers, Sondheimer & Company, tried by his Honor, Judge Learned Hand, that same sort of a question was asked and objection was made, the writing was the best evidence of its contents, and the oral negotiations and talks were held inadmissible.

The Court: I think it probably is inadmissible, but I will allow it.
Mr. Sutro: Exception.

The Witness: Mr. Eardley first approached me regarding the possibility of contracting for Kennett concentrates, and gave me an analysis of what he expected was going to be produced, and I forwarded the same to Beers, Sondheimer & Company. Afterwards it developed that he was mistaken and that it was not going to be concentrates but products of a picking plant, and negotiations were carried on with that understanding in view, that it was products of a picking plant. The tonnage that was mentioned by Mr. Eardley in our conversation was four to five hundred tons per month, but it was understood that the picking plant was not going to be ready for some weeks after we were talking and that the production in the interim would be a small one; but afterwards it was to be understood that the product would be about four or five hundred tons a month, of the analysis given me, or approximately that analysis.

[fol. 359] Cross-examination by Mr. Sutro:

X Q. 12. Mr. Salinger, the conversations that you have just given the substance of in reply to counsel's question, took place, as I understand it, during the preliminary negotiations between yourself and Mr. Eardley before the making of this contract, that is correct, is it not?

A. Yes.

X Q. 13. And you advised your principals, Beers, Sondheimer & Company, of those conversations, did you not?

A. I did.

X Q. 14. And told them what Mr. Eardley said he expected would be the tonnage?

A. As closely as I could, yes.

X Q. 15. As closely as you could; substantially as you have just told Mr. Jerome?

A. Yes.

X Q. 16. Now, the contract, as it was finally drawn up and sent by you to Kennett, was the contract as you and Mr. Eardley had discussed it, it contained those terms, did it not?

A. It contained the general terms.

X Q. 17. You saw that the terms you wanted were put in just as he saw the terms he wanted were put in?

A. I did not have anything to do with the writing out of the contract.

X Q. 18. That is not what I asked you. You were negotiating with Mr. Eardley, were you not?

A. Yes.

X Q. 19. And you told him, in the course of your negotiations, what you thought the contract ought to contain, and he told you what he thought it ought to contain?

A. No, I did not, except we discussed the price more than anything else.

X Q. 20. In discussing the price, you said what you thought the [fol. 360] price ought to be and he said what he thought the price ought to be, and that is what discussion means?

A. Yes.

X Q. 21. And you also talked about some of the other terms, the quantities and so on, as you have stated?

A. Yes.

Redirect examination by Mr. Jerome.

R. D. Q. 22. Did you at any time subsequently have a talk with Mr. Heintz, after the formation of this contract, the execution and delivery of this contract, in regard to the quantities to be delivered?

A. Yes, I did.

R. D. Q. 23. Will you state that conversation?

A. As closely as I can recollect, I spoke to Mr. Heintz relative to the excessive tonnage that was being shipped.

R. D. Q. 24. About when was that, approximately?

A. It seems to me it was in March.

R. D. Q. 25. 1915?

A. 1915.

R. D. Q. 26. Shipments were growing in excess of four to five hundred tons a month?

A. Yes, very much, and Mr. Lyon was present at the conversations and it seems that he had——

Mr. Sutro: Never mind, Mr. Witness, what it seems.

R. D. Q. 27. What was said, Mr. Salinger, in the presence of Mr. Lyon, if Mr. Lyon was there?

A. Mr. Lyon carried on most of the conversation, in the presence of Mr. Heintz.

R. D. Q. 28. Give us those conversations to the best of your recollection?

A. Mr. Lyon said that he did not think that we had a right to [fol. 361] object to the tonnage that was being shipped; that it was really up to them to say how much they were going to ship and not up to us to say how much we were going to receive, but that as a favor he would see what the minimum tonnage that Mr. Metcalf could keep the capacity of the picking plant to would be, and would let me know later during the day.

Recross-examination by Mr. Sutro:

R. X Q. 29. Mr. Lyon is in Europe now?

A. I am not informed.

Mr. Sutro: I will inform you that he is.

BENNO ELKAN, a witness, called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Jerome:

- Q. 1. Mr. Elkan, in the year 1914, where did you reside?
 A. In New York.
- Q. 2. And what was your occupation?
 A. I was manager of Beers, Sondheimer & Company.
- Q. 3. And managed the American business of Beers, Sondheimer & Company, under a power of attorney?
 A. I did.
- Q. 4. You know Mr. Lyon of these different companies?
 A. I do.
- Q. 5. And did you ever have any conversation with Mr. Lyon?
 A. Yes, I did.
- Q. 6. In reference to this contract now in suit?
 [fol. 362] A. I had two conversations with him; I do not know exactly; it may have been three; I am not sure.
- Q. 7. And when were the two succeeding talks had?
 A. Either the end of March or the beginning of April, 1915.
- Q. 8. Where were those conversations had?
 A. In Mr. Jennings' office, of the United States Smelting Company.
- Q. 9. Who else was present besides yourself and Mr. Lyon?
 A. In the first conversation Mr. Jennings was present throughout. In the second conversation Mr. Jennings, if I remember correctly, left towards the end, and I also think Mr. Green, of Sullivan, Cromwell, was present at the second conversation.
- Q. 10. These conversations with Mr. Lyon were had with reference to this contract here in suit, were they?
 A. They were during February and March, if I remember correctly. The Mammoth Copper Company was shipping approximately—
- Q. 11. Do not go into that, because that appears in evidence, it has been introduced here in evidence—the sheet which shows the shipment of those products. All I want now is the conversation which took place between you and Mr. Lyon at these two interviews?
 A. I met Mr. Lyon and we were talking about the contract, with reference to the Mammoth contract, and I complained and I told him we could not receive such large quantities, and he took the stand that we had to take whatever he shipped us. There was quite some argument about it, and he finally claimed as a matter of accommodation to us he would ship us 1,200 tons a month, and I [fol. 363] told him we refused to take it and he made a statement he could ship us up to 4,000 tons a month or anything at all.
- Q. 12. What, if anything, in these conversations between yourself and Lyon, was said about what your claim was as to the amount that should be shipped?
 A. I told them they were holding out; when they made the contract they would ship after the picking plant was in four to five hun-

dred tons a month; that they had shipped in past months between 100 and 150 tons a month.

Mr. Sutro: I move to strike the answer out.

Mr. Jerome: He states the conversation.

The Court: Are you stating the conversation?

The Witness: I am stating the conversation.

Mr. Sutro: I ask your Honor to strike out the answer.

Mr. Jerome: I would like to have a reply.

The Court: I will leave it in.

Mr. Sutro: Exception.

Q. 13. You mean you said that they held out; up to that time they were shipping only 100 to 150 tons a month?

A. Yes, up to that time.

Q. 14. What did they say to that?

A. He did not make an excuse. He said our picking plant is now in, and we have largely increased our output, and we are going to continue at the rate that we are shipping now; that was at the rate of three to four thousand tons a month.

Q. 15. You said that up to the time of the completion of the pick-[fol. 364] ing plant, they had been shipping about 150 tons a month?

A. To make myself clear, up to about January they were shipping 100 to 150 tons a month. Then afterwards up to about 400 tons, and then suddenly jumped it to about two or three thousand tons.

Q. 16. And price of spelter was high when they jumped it?

A. Certainly, it went up from something about eight or nine cents.

Q. 17. Now, when you said to Lyon that they had held out, that after the completion of the picking plant they were going to deliver four or five hundred tons a month, what did he say in regard to that?

A. They had built such a big picking plant they could not ship as little as that.

Q. 18. That conversation was about when?

A. The end of March or the beginning of April.

Q. 19. When was the next one?

A. About three or four weeks later.

Q. 20. Who was present besides you and Mr. Lyon?

A. Partly Mr. Jennings, and I think Mr. Green, of Sullivan Cromwell.

Q. 21. What was said then?

A. Then this gentleman said they were prepared to limit the tonnage under the contract, I think to about eight thousand tons, provided we would make a new contract for the year 1916 and include concentrates, at the same price.

Q. 22. Was anything at that time said about deliveries?

A. They would ship us 8,000 tons, I think, evenly divided over the whole period.

Q. 23. No. What I am getting at, was anything said at that sec-

ond interview, any statement of the amount they had agreed to ship per month?

A. They would agree to ship?

[fol. 365] Mr. Jerome: I will withdraw the question.

Cross-examination by Mr. Sutro:

C. Q. 24. Mr. Elkan, this first conversation to which you have reference as well as the second one, were both had with a view to trying to come to an agreement with the Mammoth Company over the misunderstanding that had arisen concerning the contract, is that not true?

A. That is substantially correct.

C. Q. 25. You recognize this telegram that I show you (handing paper to witness)?

A. Yes, I remember some such telegram.

C. Q. 26. And you recognize this too, do you not (handing paper to witness)?

A. Well, I suppose I received it. I do not remember.

Mr. Sutro: We offer in evidence, if your Honor pleases, telegram from B. Elkan to George W. Heintz, dated March 31st, 1915; and telegram, reply that was received, March 31st, 1915, to B. Elkan from G. W. Heintz.

(Received and marked Plaintiffs' Exhibits 72 and 73, of this date.)

C. Q. 27. Mr. Elkan, there has been offered in evidence here a letter from yourself to the Mammoth Copper Mining Company—(will you kindly let me see Defendant's Exhibits O and P) dated April 6th, 1915, in which you say "we regret that at the personal conference which our Mr. Elkan had yesterday with your Mr. Lyon we [fol. 366] were not able to get Mr. Lyon on your behalf to rece," &c. That letter was sent by you, was it not?

A. Yes.

C. Q. 28. And Defendant's Exhibit P, letter from Mr. Lyon, dated April 15th, 1915, is in reply to your letter of April 6th?

A. I suppose so.

C. Q. 29. The two conversations concerning which you have testified, were held in pursuance of the telegraphic request which you made of Mr. Heintz that he try to get Mr. Lyon together?

A. I do not think I made the request; I think the suggestion came from Mr. Salinger here, of Salt Lake, that I should meet Mr. Lyon.

Mr. Sutro: I ask that the answer be stricken out.

The Court: Strike it out.

C. Q. 30. Now, Mr. Elkan, the two conversations concerning which you have testified, and the two letters which you have been shown, had reference to the meeting which you asked Mr. Heintz to arrange in the telegram you sent, dated March 31st, 1915, did they not?

A. I do not remember.

C. Q. 31. They were both conversations and meetings had for the purpose of trying to bring about an amicable adjustment?

— That is correct.

C. Q. 32. An amicable adjustment did not result, did it?

A. It did not.

Mr. Sutro: If your Honor pleases, I ask that this matter, that the letter of the witness to the Mammoth Company, Defendant's Exhibit O, and the reply of Mr. Lyon, Defendant's Exhibit P, which were [fol. 367] both objected to, be stricken out, as evidence of a compromise which came to naught and cannot be considered as evidence in this case.

The Court: I will deny your motion.

Mr. Sutro: Exception.

For the sake of the record, we ask to have the direct examination of this witness stricken out, on the ground it relates entirely to a matter of compromise that was not consummated.

The Court: Denied.

Mr. Sutro: Exception.

C. Q. 33. Mr. Elkan, I show you a telegram; see if you recognize it (handing paper to witness)?

A. I think I have a faint recollection of it.

C. Q. 34. Well, a faint recollection is sufficient. You have a recollection of it?

A. I do not know whether I wrote or sent it. I think I saw it.

C. Q. 35. You remember it being sent?

A. I would not say that.

C. Q. 36. You know it was sent?

A. I think I remember it was sent, but I could not swear to it.

Mr. Sutro: There is no objection, if your Honor pleases, to the introduction of these telegrams; counsel so stipulates; the first is a telegram from Herbert Salinger to W. H. Eardley, dated February 23rd, 1915, and the other from W. H. Eardley to Herbert Salinger, dated February 24th, 1915.

Received and respectively marked Plaintiff's Exhibits 74 and 75, of this date.

Mr. Sutro: I understand, in the taking of one of the depositions, [fol. 368] there was an Exhibit 75, so will you kindly not use 75 here; and in connection with the matter of exhibits, I want to call attention and let it appear in the record, that there were two exhibits that have been given two numbers; our Exhibit No. 6 has also been given the No. 65; our Exhibit No. 7 has also been given the No. 66. That had better appear to straighten it out. I discovered that yesterday.

The Clerk: We will mark the last one 75A.

C. Q. 37. Mr. Elkan, the terms of the contract between Beers, Sondheimer & Company and the Mammoth Company were not profitable to the Beers, Sondheimer & Company?

A. Which time do you speak of?

181

C. Q. 38. In January, 1915?

A. January, 1915?

C. Q. 39. Yes.

A. Oh, yes they were.

C. Q. 40. And did that continue so during January and February?

A. Depends upon the quantity.

C. Q. 41. And at that time the Mammoth Company had not shipped any ore concerning the quantity of which you had complained, had it?

A. What?

C. Q. 42. You speak of January and February, 1915?

A. In January and February they had no difficulty. I did not get your question. I did not quite understand the import of the question.

C. Q. 43. You understood the question, did you not?

A. No, I did not.

C. Q. 44. When did you first complain of excessive tonnages from the Mammoth Company?

A. To the best of my recollection, I think it was February.

[fol. 369] C. Q. 45. Is there not a telegram here, March, 1915, which is your first complaint—dated March 17th, 1915?

A. Then it was March. I do not recollect it exactly.

C. Q. 46. I am asking you was not the contract profitable or was it not profitable to Beers, Sondheimer & Company? You tell me that it was profitable in January; was it profitable in February?

Mr. Jerome: I fail to see the relevancy of it. I object.

The Court: I will allow it.

Mr. Jerome: Exception.

A. The question of being profitable or not did not enter at all. It was a question of quantity.

C. Q. 47. You never considered the question of profitability?

A. I did not.

C. Q. 48. Will you please explain to the Court why you had Mr. Eardley send this telegram, dated February 23rd, asking about the terms?

A. I did not—you mean Mr. Salinger?

C. Q. 49. Yes.

A. It is simply a matter of business policy which happens very often between two parties, try to propose to change a contract; that happens very often; that happens every day.

C. Q. 50. You tell the Court that you were satisfied with the terms of that contract and you had Mr. Salinger or Mr. Eardley plead with him to give you better terms, is that the fact?

A. Yes.

Mr. Jerome: We have prepared a list of the spelter prices.

Mr. Sutro: Let it go in subject to correction.

[fol. 370] Mr. Jerome: Subject to correction from the Engineer of the Engineering & Mining Journal, we offer the average weekly quo-

tations St. Louis spelter; it is subject to correction and runs from August 1st to February 23rd, 1916.

I think that is all we have to present.

Mr. Sutro: We have a very short rebuttal, your Honor, except as it is made unnecessarily long, in our opinion, by this American Metal Company contract.

Rebuttal Proofs

Mr. Sutro: We would like to read a few questions from the deposition of A. P. Anderson. Page 311 of the depositions taken in San Francisco, as follows:

Page 311:

"Q. Mr. Anderson, I want to show you a paper which has been offered in evidence in this case, and marked Plaintiff's Exhibit '1,' and to which is attached another paper which has been offered in evidence, and marked Plaintiff's Exhibit '2,' and ask you to look at that and see if you recognize it?

A. I do, very well.

Q. The paper marked Exhibit '1' is a paper purporting to be an agreement dated August 26th, 1914, between Mammoth Copper Mining Company, and Beer, Sondheimer & Company; will you look at the sixth page of that exhibit and see if the same contains thereon any marks or writing made by you?

A. It does.

[fol. 371] Q. And what is there on that page which was made by you?

A. The letters 'A. P. A.' "

Page 313:

"Were there ever any writings passed between you and the Company in regard to your employment or duties as general manager?

A. I think there were; I am sure there were.

Q. Now will you state whether or not it was customary for you as general manager of the company to approve—you have already stated that; the fact is there?

A. Yes.

Q. —the contracts under which the Mammoth Company was operating in the purchase of ore, which have been executed by Mr. Metcalf, will you state whether or not they have been approved by you?

A. They were.

Q. Will you state what the initialing of this contract by you so far as your intent in putting the same onto the page, meant?

A. I gave my approval to that contract.

Q. Stating the question in another form, in view of the objection that has been made, but allowing that question and answer to stand—will you state whether or not you approved that contract?

A. I did.

Q. How did you approve it?

A. By placing my initials upon it.

Q. I believe you stated that you did that at or about the latter part of September, 1914?

A. Yes."

Mr. Tibbetts: Just a few questions and answers.

[fol. 372] Page 315:

Cross examination by Mr. Tibbetts:

"Q. Mr. Anderson, you had nothing to do with negotiating this contract, did you?

A. No.

Q. Do you know by whom it was negotiated in behalf of the Mammoth Company?

A. By Mr. Metcalf and Mr. Heintz."

Mr. Sutro: I would like to state, if your Honor pleases, in view of the attitude of the defence with reference to these subsidiary companies of the United States Smelting, Refining & Mining Company, and I would like to call to your Honor's attention, if you cared to see them, we have two very large packing boxes full of exhibits, which contain printed statements, of which I am showing your Honor now a form, not only of this but of other evidence, showing how the plaintiff in this case in its dealings with Beers, Sondheimer & Company both prior to the breaking of this contract and after, kept strict account of every ton of ore that went out of Kennett. There are large sheets, approximately 3 feet by 4 feet, on which the Weight Master has his reports. There are books showing the assays and the analysis of every ton of ore that went out. There are corresponding settlement sheets to this your Honor has just seen, from the United States Smelting Company of Kansas City, for every ton of ore that was received from the Mammoth Company, arranged in the same way as were settlement sheets to [fol. 373] other companies. There are large books kept at the Kansas City office under the direction of Mr. Eardley, in which the shipments from the Mammoth Company were treated in exactly the same way as shipments from other concerns; and there is other similar evidence we did not want to burden the Court with, but it is there if the Court wishes to see it, and in that connection I would say that those exhibits are all in our possession now and have been there for the convenience of counsel on both sides. They are very bulky and voluminous, some exhibits consisting of fifty to sixty and a hundred pages, and we want to know whether we are still to keep them or whether they are to be left in court. Are we to keep them?

Mr. Tibbetts: I should think so.

Mr. Jerome: Is it conceded that all payments made by Beers, Sondheimer & Company under their contract with Mammoth, on the settlement sheets and settlements with regard thereto, were

made between Beers, Sondheimer and the United States Smelting Refining and Mining Company? Is that correct?

Mr. Sutro: Subject to the statement which I ask you to add, which is the fact that copies of those settlement sheets were sent to Kennett.

Mr. Jerome: Sent by whom?

Mr. Sutro: By Beers, Sondheimer & Company. We cheerfully make that admission.

Now, we will read, if your Honor pleases, certain parts of the [fol. 374] deposition of Frederick Lyon, concerning which the defendant has read.

From Deposition of Frederick Lyon

By Mr. Sutro:

Page 3:

"Q. After the contract was entered into, state whether or not the Mammoth Copper Mining Company of Maine proceeded with the erection of a picking plant at its property at Kennett, California?

A. The Company did soon after."

Page 4:

"Q. Did the Mammoth Copper Mining Company of Maine, after the execution of this contract, ship its entire output of crude metallic ore to Beer, Sondheimer & Company up to March, 1915?

A. The Company did until it was refused.

Q. It did up to the time it was refused by Beer, Sondheimer?

A. Up to the time it was refused by Beer, Sondheimer."

Page 6:

"Q. Did you have any conferences with Mr. Elkan with reference to the deliveries of ore by the Mammoth Copper Mining Company to Beer, Sondheimer & Company?

A. I had a conference with Mr. Elkan about the ore shipments and the contract."

Page 8:

"Q. What did Mr. Elkan say to you with reference to that contract?

A. He objected to the tonnage as shipped and wanted a modification of the terms of the contract.

Q. Do you remember the exact words of the conversation, Mr. Lyon?

A. No.

Q. Do you remember the general purport of the conversation? [fol. 375] A. I do.

Mr. Tibbetts: One moment. On that previous answer, there was a motion to strike out the answer as being the witness's conclusion

and not stating a conversation, and I make that motion at this time.

The Court: Then he goes on and asks for the conversation, as I understand it?

Mr. Sutro: Yes, sir.

The Court: I will deny your motion.

Mr. Tibbetts: Exception.

"Q. Will you please state therefore, the general purport of the conversation?

A. Mr. Elkan stated that the shipments should be around 400 tons a day—I mean 400 a tons a month—and he thought that the terms should be improved, that they should get better smelting charges. I told Mr. Elkan that we would be willing to allow him somewhat better terms, but as far as the tonnage was concerned, I insisted that we should ship the tonnage which the mine produced. Mr. Elkan at that time, on a piece of paper, had the terms which he wanted. I said I could not accept the terms.

Q. Did you ever state to Mr. Elkan that you considered that the Mammoth Copper Mining Company of Maine had a right to ship as much or as little ore as it desired under the contract of 1914?

A. I don't remember saying anything like that.

Q. Do you remember stating to Mr. Elkan that you had the right to ship nothing or to ship 4,000 tons a month, as you desired, under the contract of August 1914?

A. No.

[fol. 376] Q. Did you make any such statement?

A. No.

Q. Do you remember stating to Mr. Elkan that you were entirely free in your discretion to refrain altogether from shipping Beer, Sondheimer & Company any ore or to ship as much as you might desire?

A. No.

Q. Did you make any such statement?

A. No."

Page 23:

"Q. In other words, the contract might be made in the name of the Mammoth Company, or in the name of the United States Smelting Company, as it happened—the contract for the sale of ores from the Mammoth mine?

A. I don't know whether there might be or not."

Page 26:

"The same ore which you shipped to Beer Sondheimer & Company could have been sold as copper ore, could it not?

A. No.

Q. What do you consider commercial zinc ore?

A. That is something that depends on various conditions. If the smelting charge is high and commercial transportation is high, of course it takes higher grade spelter. That is entirely commercial. Nobody could answer that question.

Q. By commerical conditions what do you mean?

A. Well, commerical ore is ore which will pay a profit under the conditions that exist at the time.

Q. And what are those conditions?

A. The conditions are the grade of the ore, the transportation charges, freight charges, the recoveries in the smelter and the price of the spelter."

I would like to call Mr. Jennings.

[fol. 377] SIDNEY J. JENNINGS, a witness, called on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct examination by Mr. Sutro:

Q. 1. Your name is Sidney J. Jennings?

A. Yes, sir.

Q. 2. And where do you reside, Mr. Jennings?

A. New York.

Q. 3. And have lived there for many years?

A. Yes.

Q. 4. Are you connected with the United States Smelting Refining and Mining Company?

A. I am vice-president and director.

Q. 5. Were you vice president and director in 1914 and in 1915?

A. Yes.

Q. 6. You are not and were not an officer of the Mammoth Copper Mining Company of Maine, were you?

A. No.

Q. 7. Do you know Mr. B. Elkan?

A. Yes.

Q. 8. Will you state, Mr. Jennings, whether or not you were present at a conversation between Mr. Lyon and Mr. Elkan, had in your office here in New York City on the 5th of April, 1915.

A. I was present.

Q. 9. There has been offered in evidence here a letter from Beers, Sondheimer & Company, Defendant's Exhibit O, to the Mammoth Copper Mining Company of Maine, which Mr. Elkan says he wrote, and that letter is dated April 6th, 1915, and in it occurs the first sentence as follows: "We regret that at the personal conference which our Mr. Elkan had yesterday with your Mr. Lyon"—drawing your attention to that, can you state whether or not the conversation [fol. 378] there referred to was the conversation at which you were present between Mr. Lyon and Mr. Elkan?

A. It is the conversation at which I was present.

Q. 10. Will you state whether or not Mr. Lyon made this statement or said words to this effect, at that conversation: "Mr. Lyon insists that you have the right"—and I am now reading from the letter, Defendant's Exhibit O—"to ship nothing or to ship four thousand tons a month, as you may desire, and he takes the posi-

tion that it would be entirely as a favor to us for you to limit your shipments to 1,200 tons a month."

A. I did not hear Mr. Lyon make any such statement.

Q. 11. Was the entire conversation between Mr. Elkan and Mr. Lyon had in your presence?

A. Yes.

Q. 12. You saw Mr. Elkan depart from the room?

A. I did.

Q. 13. And had Mr. Lyon come to any understanding?

A. No understanding.

Q. 14. The conversation was had for the purpose of trying to come to an amicable adjustment of the dispute that had arisen between Beers, Sondheimer & Company and Mammoth Company, that is a fact, is it?

A. Yes.

Q. 15. And during the conversation you heard Mr. Lyon make no statement to the effect I have just read to you?

A. No.

Q. 16. Did Mr. Lyon state anything in any way to that import?

A. No.

Q. 17. What did Mr. Elkan say with reference to the terms of the contract, whether they were burdensome or not to Beers, Sondheimer & Company?

[fol. 379] A. Mr. Elkan said that the terms, owing to the extreme rise in the price of zinc, and the probability that there would be a fall, were burdensome and dangerous, unlikely to be profitable.

Q. 18. Did he state whether or not he desired a modification of it?

A. He desired a modification of it.

Q. 19. Did he have any memorandum with him showing the modification?

A. I think he did. I am not sure of that fact, but I think he did.

Q. 20. Mr. Lyon took the position that the contract had been made and that the contract should be abided by?

A. Yes.

Q. 21. Mr. Jennings, you are vice-president of the United States Mining Exportation Company, are you not?

A. Yes.

Q. 22. In charge of its active work, and have been so ever since it was incorporated?

A. Yes.

Q. 23. Some years ago?

A. Yes.

Q. 24. Mr. Jennings, are you familiar, as vice-president of the United States Smelting, Refining & Mining Company with the inter-corporate relations between the various subsidiaries, including the Mammoth Copper Mining Company and the United States Smelting Company?

A. Yes.

Q. 25. Are the affairs of the United States Smelting, Refining & Mining Company and its various subsidiaries kept separate and distinct?

A. They are kept quite separate.

Q. 26. The United States Smelting, Refining and Mining Company has among other subsidiaries the United States Smelting Company?

A. Yes, it had that.

Q. 27. The United States Mines Company?

A. Yes.

[fol. 380] Q. 28. The Needles Mining & Smelting Company.

A. Yes.

Q. 29. The Gold Road Mining Company?

A. Yes.

Q. 30. The United States Metal Company, at Grasseli, Indiana?

A. Yes.

Q. 31. And you had other properties not necessary now to enumerate. I want to ask you whether the accounts of all of those companies kept separate and distinct?

A. Yes.

Q. 32. Do you know that of your own knowledge from examination of the books?

A. Yes.

Q. 33. Were earnings of the various companies and taking particularly the Mammoth Company, with which we have here to do, separately distributed?

A. Yes, the United States Smelting Refining & Mining Company acting as fiscal agent for the Mammoth Company.

Q. 34. Were the earnings of the Mammoth Company distributed to the United States Smelting, Refining and Mining Company by way of dividends?

A. They were.

Q. 35. Mr. Jennings, was there a distinct separate operation of each company by a manager thereof?

A. Yes, part of my duty was to keep the different managers in harmony with each other, to see that one manager would not object that he was not being fairly treated, and part of my duty was to see that any difference that might arise was reconciled.

Q. 36. You mean if one manager thought he was not being fairly treated by the manager of some other plant?

A. Yes.

Q. 37. And each manager was trying to make the best showing for himself?

A. Yes.

Q. 38. That included the Mammoth Company?

A. Yes, that spirit was fostered by the parent company in order [fol. 381] to increase the efficiency of the operations of the separate plants.

Q. 39. That would bring about the best results for the parent company?

A. That would bring about the best results for the parent company?

Cross-examination by Mr. Jerome:

C. Q. 40. And then annually the United States Smelting, Refining & Company got up and put out a report which embodied its own operations and all these subsidiaries?

A. Yes, sir.

C. Q. 41. And the two documents I now show you, purporting to be the ninth and tenth annual reports of the United States Smelting, Refining & Mining Company, are the two reports put out and circulated by the United States Smelting, Refining & Mining Company, are they not?

A. These appear to be the printed reports, yes.

C. Q. 42. And when those reports went out you were familiar with them, were you not?

A. Yes.

C. Q. 43. The intercorporate relations, while they were kept perfectly distinct and separate, there was a set of books kept by the United States Smelting, Refining & Mining Company and a set of books kept by the Mammoth?

A. Yes.

C. Q. 44. But all clearances of cash balances and so on were all made through the parent company, the United States Smelting, Refining & Mining Company?

A. They acted as fiscal agents of the subsidiary companies and as such by a system of voucher drafts paid all accounts and received all the moneys.

C. Q. 45. And all the money ultimately went in one pot and got to the stockholders of the United States Smelting, Refining & Mining [fol. 382] Company, if there was any to distribute?

A. By the way of dividends.

Mr. Sutro: You mean by way of dividends from the subsidiary companies?

The Witness: By the way of dividends from the subsidiary companies.

C. Q. 46. There was nobody else the recipient of such profits as they might be but the United States Smelting, Refining & Mining Company, the parent company?

A. Unless there was some minority shareholders, which there were in certain subsidiaries.

C. Q. 47. There were no minority shareholders, I understand it is conceded here, excepting directors having qualified shares, either in the Mammoth or United States Smelters?

A. No, there were not any minority shareholders.

C. Q. 48. These smelters that you acquired, the United States smelters, and the other, were acquired after the repudiation of the Beers, Sondheimer contract?

A. Yes.

C. Q. 49. And you have sufficient familiarity with the reports to know that the statements in these balance sheets, statements given out to its stockholders of profits and so on, from such smelters, is correct and true?

A. Yes.

C. Q. 50. And when it states in the report of the year ending December 31st, 1915, \$6,000,000 was written off its investment for these smelters out of earnings, and the balance to be written off during 1916, that is a true statement?

Mr. Sutro: That is entirely immaterial, your Honor. It is going [fol. 383] to result in our having to show your Honor that those smelters were really written off without having earned anything.

Mr. Jerome: I will have these two marked as exhibits. You have no objection to these going in?

Mr. Sutro: Not at all. I will be glad to have the Court have that. With the understanding that arguments are to be restricted to the matters referred to.

Mr. Jerome: I offer these reports and the whole of them in so far as they refer to the matters in issue.

Mr. Sutro: I understand they are in evidence subject to the usual rule, they are to be used concerning the matters about which evidence has been offered, and not for all purposes.

Mr. Jerome: That is my understanding.

The Court: I do not see how they can be used in any other way than upon the issues in the case.

Received and marked Defendant's Exhibit V of this date.

W. H. EARDLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Sutro:

Q. 1. You are Mr. W. H. Eardley?

A. Yes, sir.

Q. 2. And where do you reside, Mr. Eardley?

A. New York City.

[fol. 384] Q. 3. You are at present in the employ of the United States Smelting, Refining & Mining Company?

A. Yes, sir.

Q. 4. You have been here during this trial?

A. Yes, sir.

Q. 5. You are the Mr. Eardley whose name has been mentioned at various times during the trial?

A. Yes, sir.

Q. 6. Mr. Eardley, in 1914, you were employed by the United States Smelting Company?

A. Yes, sir.

Q. 7. While you were in the employ of the United States Smelting Company, did you ever make a contract for ore from Mammoth belonging to the Mammoth Company, without the authority of Mr. Metcalf?

A. No, sir.

Q. 8. I show you a paper which has been offered in evidence here

and marked Defendant's Exhibit S; do you recognize that paper (handing paper to witness)?

A. Yes, sir.

Q. 9. Do you know Mr. Putzel?

A. Yes, sir.

Q. 10. That is Mr. Putzel who was assistant manager of the Denver office of the American Metal Company in 1914. Did you have any negotiations with anyone looking to the making of this contract dated June 10th, 1914, Defendant's Exhibit S?

A. Yes, sir, with Mr. Putzel.

Q. 11. Now, will you state to the Court, please, the circumstances and conditions concerning these negotiations?

Mr. Jerome: That is objected to as wholly irrelevant and self-serving declaration. This is the American Metal Company contract.

The Court: I will allow it.

Mr. Jerome: Exception.

[fol. 385] A. Mr. Putzel wired me in May, 1914, requesting that I notify him when I was about to leave Salt Lake to take a trip to the northwest. In pursuance to that telegraphic correspondence, Mr. Putzel met me in Salt Lake City in May, 1914, and we together made a trip over the northwest territory, he buying zinc ores and I contracting lead ores for the United States Smelting Company, during this trip, Mr. Putzel stating this: "Eardley, you are probably around the country all the time"—

Mr. Jerome: I do not see what relevancy this has got. This contract says, "all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller during the period of this agreement."

The Court: I will allow it.

Mr. Jerome: Exception.

The Witness: Mr. Putzel made this statement: "Eardley, you are traveling now around the country west of the Rockies. You have men from your office out. Why not enter into a contract with us which would permit your people, your men, to pick up car loads of zinc ore here, there and everywhere, and ship to us. We are in need of zinc ores, not concentrates." And while we were on that trip, we drew up a tentative agreement covering a small production of zinc middlings which we had over at Midvale, Utah, which were used [fol. 386] as the basis of the contract, and then we included the words "Kennett or any other point," so we could ship under that contract any ores we may be able to pick up by purchase and sales agency contract, and the word "Kennett" had the same significance as the words "or any other point," we first having to secure those ores from those points before we could ship them under this contract.

Q. 12. Mr. Eardley, had Mr. Metcalf at that time sent you word that he had zinc ores at Mammoth or Kennett for which he desired an outlet?

A. No, sir, there had been only one car of zinc ore shipped from Kennett up to that time, and I had no knowledge of any other cars being in existence there, of zinc ore.

Q. 13. I want to show you a letter dated July 28th, 1914, from yourself, from the United States Smelting Company, to Mr. Schott, manager of the American Metal Company. Do you recognize that as a copy of the letter that you sent (handing paper to witness)?

A. Yes, sir.

Mr. Jerome: That is objected to, because it refers wholly to concentrates.

The Court: I will allow it.

Mr. Jerome: Exception.

Mr. Sutro: I offer this letter in evidence.

Received and marked Plaintiff's Exhibit 76A, of this date.

Q. 14. Now, Mr. Eardley, what mine did you refer to when you speak of a certain mine in that letter?

A. The mine of the Mammoth Copper Company at Kennett, California.

[fol. 387] Q. 15. Had Mr. Metcalf at that time notified you that he had this product for which he was trying to get your co-operation to get an outlet?

A. Yes, sir, that is the first time I knew about it.

Q. 16. When you speak of certain correspondence which you saw pertaining to his copper product, will you state whether or not the correspondence I now show you is the correspondence to which you have reference—and I am showing you Plaintiff's Exhibits 70 and 71 and Defendant's Exhibit T. Look at T first (handing papers to witness)?

A. Yes, I saw this correspondence.

Q. 17. And that is the correspondence that you refer to in the letter?

A. That is part of it, yes, sir.

Q. 18. And the ore referred to in these letters is the ore from the mine of the Mammoth at Kennett?

A. Yes, sir.

Q. 19. Now, Mr. Eardley, I show you a letter, dated July 20th, 1914, from the American Metal Company, Limited, to the United States Smelting Company, and ask you if you recognize that (handing paper to witness)?

A. Yes, sir.

Mr. Jerome: I cannot see that these have any relevancy, and I object to them.

The Court: I will allow them.

Mr. Jerome: Exception.

Mr. Sutro: I offer them—the letter I mentioned and one dated July 21st, 1914, from the American Metal Company, Ltd., to W. H. Eardley.

Mr. Jerome: Same objection.

The Court: They may be marked.

Mr. Jerome: Exception.

Received in evidence and respectively marked Plaintiff's Exhibits [fol. 388] 77a and 78a, of this date.

Mr. Sutro: Then here is a letter from the United States Smelting Company to the American Metal Company, Limited, under date of July 27th, 1914.

Q. 20. Do you recognize that (handing paper to witness)?

A. Yes, sir.

Q. 21. That is the remainder of the correspondence referred to in your letter of July 28th?

A. Yes, sir.

Mr. Sutro: We offer this letter in evidence.

Mr. Jerome: Same objection.

The Court: It may be received.

Mr. Jerome: Exception.

Received and marked Plaintiff's Exhibit 79a, of this date.

Q. 22. Here is another letter which I show you and ask if you recognize it (handing paper to witness)?

A. Yes, sir.

Mr. Sutro: This is a letter dated July 20th, 1914, from The American Metal Company, Limited, to Mr. W. H. Eardley of the United States Smelting Company.

Received and marked Plaintiff's Exhibit 80a, of this date.

Mr. Sutro: We offer in evidence letter of Mr. Eardley to the American Metal Company, dated August 4th, 1914.

[fol. 389] Q. 23. Do you recognize that (handing paper to witness)?

A. Yes, sir.

Received and marked Plaintiff's Exhibit 81, of this date.

Q. 24. I ask you if you recognize this letter of August 6th, 1914, from the American Metal Company, Limited, to yourself (handing paper to witness)?

A. Yes, sir.

Mr. Sutro: We offer this letter in evidence.

Received and marked Plaintiff's Exhibit 82, of this date.

Q. 25. Here is a copy of letter from yourself to the American Metal Company, dated August 8th, 1914; do you recognize that (handing paper to witness)?

A. I recognize the letter; I don't know whether I wrote it; it came from my office.

Received and marked Plaintiff's Exhibit 83, of this date.

Q. 26. Do you recognize this letter dated August 12th, 1914, from the American Metal Company, Limited, to yourself (handing paper to witness)?

A. Yes, sir.

Received in evidence and marked Plaintiff's Exhibit 84, of this date.

Q. 27. Do you recognize this copy of letter, dated August 14th, 1914, to the American Metal Company (handing paper to witness)?

A. Yes, sir.

[fol. 390] Received in evidence and marked Plaintiff's Exhibit 85, of this date.

Q. 28. Now, at that time, you were having communications with Mr. Metcalf, regarding this zinc ore, and trying to find a market for it, were you not?

A. Yes, and I talked with him personally, too.

Q. 29. Did you tell him that you were trying to place it with the American Metal Company and with Beers, Sondheimer & Company?

A. I do not know.

Q. 30. I show you this letter and ask if you recognize that (handing paper to witness)?

A. Yes, sir.

Mr. Sutro: We would like to offer this in evidence, letter to Mr. Metcalf from Mr. Eardley, dated August 25th, 1914.

Mr. Jerome: I fail to see how a communication between Mr. Metcalf and Mr. Eardley is relevant or binding on us.

The Court: I will take it.

Mr. Jerome: Exception.

Received and marked Plaintiff's Exhibit 86, of this date.

Q. 31. Now, when you speak in here, Mr. Eardley, of the contract recently made by the United States Smelting Company, which one do you refer to?

A. The one with the American Metal Company.

Q. 32. That has been offered in evidence here and received?

A. Yes.

Q. 33. Mr. Eardley, state whether or not you are familiar with the fact that Beers, Sondheimer & Company, in March, 1915, had refused [fol. 391] to take ore from the Mammoth Company under its contract with the Mammoth Company?

A. Yes, sir.

Q. 34. Did you at that time, at the request of the manager of the Mammoth Company endeavor or undertake to find a market for this ore that Beer, Sondheimer & Company refused to take?

A. I did.

Q. 35. Do you recognize letter I now show you a copy of, from Mr. Howard, of the United States Smelting Company to the American

Metal Company, Ltd., dated March 25th, 1915 (handing paper to witness)?

A. Yes.

Mr. Jerome: The same objection covers this whole line of evidence.

The Court: I will let it in.

Mr. Jerome: Exception.

Mr. Sutro: I would like to offer a copy of that letter with certain pencil changes in it, and ask the witness if he knows whose *handing* those are in?

The Witness: Mr. Heintz.

(Letters received in evidence and respectively marked Plaintiff's Exhibits 87 and 88, of this date.

Q. 36. Now, the next one is of April 1st, 1915, from the American Metal Company Limited to the United States Smelting Company, discussing the question of the acceptance of the Kennett ores. The next one is letter dated April 5th, 1915, from the United States Smelting Company to the American Metal Co., Ltd. The next is one of April 14th, 1915, from the United States Smelting Company to the American Metal Co., Ltd. The next one is April 17th, 1915, from [fol. 392] the American Metal Company, Ltd., to the United States Smelting Company. The next one is dated April 24th, 1915, from the American Metal Company, Ltd., to the United States Smelting Company. Did those efforts to sell that ore to the American Metal Company come to anything?

A. No, sir.

Letters respectively marked Plaintiff's Exhibits 87, 88, 89, 90, 91, 92 and 93 of this date.

Q. 37. When Mr. Metcalf first spoke to you about these Kennett ores, he was undecided whether or not they would be handled as a concentration proposition or crude ore proposition, was he not?

A. Yes, sir.

Q. 38. There has been offered in evidence here by the defence, a letter, marked Exhibit D, dated July 28th, 1914. What zinc ore did you have reference to?

A. Zinc ore from Kennett, California.

Q. 39. From the Mammoth mines?

A. Yes.

Q. 40. I show you a letter dated April 5th, 1915, from yourself to Mr. G. W. Metcalf, in which you refer to correspondence with the American Metal Company. Do you recognize that (handing paper to witness)?

A. Yes, sir.

Mr. Sutro: I will offer this in evidence.

Mr. Jerome: The same objection.

The Court: I will take it.

Mr. Jerome: Exception.

Received and marked Plaintiff's Exhibit 94, of this date.

Mr. Sutro: I offer Mr. Metcalf's reply, dated April 10th, 1915.
 [fol. 393] Received and marked Plaintiff's Exhibit 95, of this date.

Cross-examination by Mr. Jerome:

X Q. 41. When this contract of June 10th, 1914, was in negotiation between the American Metal Company and the United States Smelting Company, were you cognizant of the negotiations?

A. I negotiated the contract.

X Q. 42. You negotiated the contract?

A. Yes, sir.

X Q. 43. And yet you say that at that time it was contemplated that this contract should not extend to the products of the Mammoth mine at Kennett?

A. No, sir.

X Q. 44. You say that as the fact?

A. Yes, sir.

X Q. 45. Who drew the contract?

A. Mr. Putzel and I drew it up on our trip to the northwest.

X Q. 46. You mean you and Mr. Putzel drew the contract on your trip to the northwest that was afterwards actually signed, the one produced in evidence here?

A. A similar one. It was the same contract that was signed.

X Q. 47. I want to know—I hand you now the original contract, executed by the United States Smelting Company, by George W. Heintz, manager—I am not now asking you at all in regard to some contract something like this that you and Mr. Putzel talked over in your trip to the northwest or wherever it was, but I am asking you who prepared this contract, this original, that was executed by the United States Smelting Company by George W. Heintz?

A. I did.

[fol. 394] X Q. 48. And did you execute that?

A. I did not execute it.

X Q. 49. At the time of the preparation of that, had you already had your trip with Mr. Putzel?

A. Yes, sir.

X Q. 50. And had you and Mr. Putzel agreed that the contract that was to be made should not include Kennett ores, Mammoth ores?

A. We agreed that it should cover the 50 or 70 tons of Midvale middlings, and any other product we might control.

X Q. 51. Had you decided at that time that it should not cover Mammoth ores?

A. We never agreed on anything specifically with reference to Mammoth ores. There were no such as far as I knew.

X Q. 52. There were no other ores at Kennett except Mammoth ores?

A. I did not know of any ores at Kennett either Mammoth or otherwise.

X Q. 53. You knew there was a corporation called the Mammoth Copper Mining Company of Maine?

A. Yes, I did.

X Q. 54. And you knew that it had a mine and that it had been in operation in Shasta County, California?

A. I did.

X Q. 55. And you knew it was one of the subsidiaries of the United States Smelting, Refining & Mining Company?

A. Yes, sir.

X Q. 56. And you knew that the United States Smelting, Refining & Mining Company had one subsidiary known as the United States Smelting Company?

A. I did.

X Q. 57. And the relations of those two companies were close, were they not?

A. Had a harmonious working arrangement, yes; sir.

[fol. 395] X Q. 58. They had a working arrangement. You knew, did you not, before you drew this contract with the United States Smelting Company, between the United States Smelting Company and the American Metal Company, that there was zinc ore at Kennett?

A. I did not. They had only shipped one carload in its history.

X Q. 59. You had not heard of its discovery there?

A. No, sir; I had not.

X Q. 60. And they had shipped one car load of zinc ore?

A. Yes, sir.

X Q. 61. When was that?

A. April, 1914, I believe, to Beers Sondheimer.

X Q. 62. Well, if there was any crude zinc ore or zinc sulphide concentrates or sulphide middlings at Kennett, why in drawing this contract did you say "the product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller during the period of this agreement"?

A. Because as they had shipped one carload during the two-year period, there was a possibility of producing another, and terms could be satisfactory to Mr. Metcalf, in which event we could ship it.

X Q. 63. When you purchased the United States Smelting Company, did they have zinc smelters at that time?

A. No, sir.

X Q. 64. Did you buy or sell zinc ores at that time for them?

A. I do not know but what we might have bought a car now and then and resold it to some zinc smelter.

X Q. 65. You had a mine in Midvale?

A. A specific product.

[fol. 396] X Q. 66. There was a mine?

A. No, sir; a small concentration mill.

X Q. 67. And where did it get its ore from?

A. All over the country.

X Q. 68. What was the Needles?

A. That was a mill at Needles, California.

X Q. 69. And they handled zinc ore?

A. Yes, sir.

X Q. 70. And you bought and sold for these different western subsidiaries, did you not?

A. Yes, sir.

X Q. 71. And if I remember Mr. Metcalf's testimony, he testified that this large body of zinc ore was discovered about April, 1914, at Mammoth?

A. I do not know when it was discovered.

X Q. 72. And you never heard of it on the 10th day of June, when you drew this contract?

A. No, sir.

X Q. 73. What was the idea? Did you think there was no zinc there at all?

A. I didn't know whether they would have another car to ship or not.

X Q. 74. But you went on the theory there might be some there?

A. Yes, that might have it sometime.

X Q. 75. And in case they might have it and in order to safeguard and be sure you had a purchaser for it, you stuck it in this contract?

A. It did not have any more significance than the words "or any other point." I do not think it was put in there to safeguard anything.

X Q. 76. You drew this and you put it in there. Why did you put it in there?

A. As a matter of form, that is all; it meant nothing at all than the words did, nothing more, we could have shipped from other points if we could acquire it under terms that would permit us to [fol. 397] ship under that contract. It made no difference where we got the ore. That was the purpose of the contract.

X Q. 77. Your little trip with Mr. Putzel was in June, 1914?

A. We started in May and returned in June.

X Q. 78. Did you while on that trip with Mr. Putzel discuss zinc ores—did you not discuss zinc ores from Kennett with Mr. Putzel?

A. I do not think so.

X Q. 79. Can you recollect whether you did or not?

A. I think not.

X Q. 80. Are you prepared to swear now?

A. No, sir, I am not prepared to swear.

Mr. Sutro: That is not a proper question.

The Court: I will allow it.

X Q. 81. As you sit there now?

A. I do not know whether I told him or not.

X Q. 82. Have you any present recollection whether you told Mr. Putzel whether or not you had crude zinc ores at Kennett?

A. I do not know.

X Q. 83. Is it not a fact that you proposed to Mr. Putzel on that trip, to enter into a contract with the American Metal Company, Limited, Mr. Putzel representing them, to sell them crude zinc ores

or Kennett, the contract to extend over two or three years at the same terms as the contract in reference to Needles?

A. I think not.

X Q. 84. Do you now swear?

A. I think not.

X Q. 85. Listen to me. Do you now swear that your recollection is clear and that you recollect on that trip you did not make that proposition in words or substance to Mr. Putzel?

A. I do not remember of any such conversation.

[fol. 398] X Q. 86. Do you remember that you did not have such a conversation?

A. I have no recollection of it, that is all I can tell you.

X Q. 87. Do you not think if you had proposed to give him the output of Kennett for two or three years on the same terms as the contract with reference to Needles, you would recall it?

Objection. Overruled. Exception.

A. I probably would recall.

X Q. 88. There was a contract with Needles in June, 1914?

A. There was.

X Q. 89. And it had reference to zinc ores?

A. I think zinc concentrates.

X Q. 90. Where was this Needles?

A. Needles, California.

X Q. 91. And what did Midvale produce?

A. Midvale produced a hythelectic sticky product, which was under contract, and the middling product which was under contract at that time.

X Q. 92. Is that zinc sulphide middling?

A. Yes, sir.

X Q. 93. Midvale did not at that time produce crude zinc ores?

A. No, sir.

X Q. 94. I call your attention to the fact that this American Metal Company contract, reads as follows: "the product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller" etc. Among the products mentioned there the only one that could have come from Midvale that time was sulphide middlings was it not?

A. Yes, sir.

[fol. 399] X Q. 95. But at the time of this contract Kennett had already produced at least one carload?

A. Just one carload.

X Q. 96. Of crude zinc sulphide ore?

A. Yes, sir.

GEORGE W. METCALF, witness having been previously sworn, recalled by the plaintiff, further testified as follows:

Direct examination by Mr. Sutro:

Q. 1. Mr. Metcalf, there has been before the Court here the much talked about contract between the American Metal Company and the United States Smelting Company, or turn it around, between the United States Smelting Company and the American Metal Company, dated June 10th, 1914. When did you first see that contract?

A. Late in the Fall of 1919.

Q. 2. Now, will you please tell the Court how you came to see it?

Mr. Jerome: That is immaterial.

The Court: I will allow it.

Mr. Jerome: Exception.

A. When I was engaged in looking up the price, to get a fair price for the ore involved in this suit. I was endeavoring to get the terms given in as many other contracts for zinc ore up to that time as possible, and I went through the file of contracts in the Salt Lake office of the United States Smelting Company, and among others I saw this particular contract, but I did not at that time get a copy [fol. 400] of it further than making a memorandum as to the terms.

Q. 3. I show you a letter from Mr. Eardley of the United States Smelting Company to yourself, dated February 24th, 1915, and ask you if you recognize that letter (handing paper to witness):

— Yes, I recognize that letter.

Mr. Jerome: That is objected to as wholly irrelevant.

The Court: I will allow it.

Mr. Jerome: Exception.

Received and marked Plaintiff's Exhibit 96, of this date.

Q. 4. I show you a letter from yourself to the United States Smelting Company, dated February 22nd, 1915, and ask you if this letter is the letter to which the letter of Mr. Eardley was a reply (handing paper to witness)?

A. Yes, this is a copy of the letter.

Marked Plaintiff's Exhibit 97, of this date. Same objection, overruled, exception.

Q. 5. I show you letter from Mr. Eardley to yourself, dated April 5th, 1915, and your reply, dated April 10th, 1915 and I ask you if you recognize those (handing papers to witness)?

A. Yes, I recognize both of them.

Mr. Sutro: There might be a declaration contained in that that I do not care to provoke a discussion about, so I will not offer it.

[fol. 401] Q. 6. Mr. Metcalf, at the last hearing it was agreed that you were to supply at a certain point a statement showing the amount produced and not accepted by Beers Sondheimer, in concise form,

and the amount as it was figured, so the Court can view it concisely, I show you this statement and ask you whether this is the memorandum you have prepared on that matter (handing paper to witness)?

A. Yes, this is the memorandum.

Mr. Sutro: We offer this as an exhibit for the Court's information and not as evidence that these figures are anything except of the amounts claimed to be due from Beer, Sondheimer & Company, to be inserted in the record at the place it should go in.

Received and marked Plaintiff's Exhibit 98, of this date.

Q. 7. Mr. Metcalf, did you ever ship a pound of ore under that American Metal contract?

A. No, never did.

Q. 8. There was an exhibit offered here in the first instance, where you offered ore running less than 35 per cent to Beers, Sondheimer, letter from Metcalf to Beer; did Beer accept that ore that was tendered to them?

A. They did not accept it.

Q. 9. When this contract was made, did you know the size of the Yolo ore body?

A. I did not.

Q. 10. I understand it was not until December, 1914, that the size of that ore body was really known?

A. It was not fully known then, but by December we knew it was a pretty good sized ore body.

[fol. 402] Q. 11. The defense has introduced a letter here from the United States Smelting Company, dated October 14th, 1914, marked Exhibit B, and a letter of July 28th, 1914 from Mr. Eardley to Mr. Elkan, Exhibit E; your letter dated November 2nd, 1914, to Beers, Sondheimer & Company, and your letter of October 26th. Will you kindly state to the Court why it was that the arrangements for handling the settlements were made through the United States Smelting Company, Utah, instead of by yourself?

A. Because in Salt Lake City the United States Smelting Company—the special representative of Beers, Sondheimer had offices in the same building and could readily confer about any differences or make any adjustments that were necessary, and it was very evident to me that it would facilitate this if I would allow the ore purchasing department of the United States Smelting Company handle that for me.

Q. 12. The defense has also offered in evidence a letter dated in 1914 from Beers Sondheimer to the U. S. Smelting Company relating to certain lots, 4, 5 and 6, zinc ore, which we did not offer in evidence. Now this contract in question was executed September 29th, 1914. Will you state to the Court, kindly, why it was that you did not include these lots 4, 5 and 6 in the statement of the amount of ore sent to Beers Sondheimer under the contract and which it received and paid for?

A. Because I was advised by our attorney that the contract should not be considered as effective until it was executed.

Q. 13. And these shipments had taken place before the contract was entered into?

A. Yes.

[fol. 403] Q. 14. Mr. Metcalf, when you sold the zinc ore to the United States Smelting Company, at its smelter at Altoona, will you state to the Court whether or not there was any other outlet for that ore, or whether you had tried to find any other outlet for it and whether finally that was the only place you could sell it?

A. I tried and was unable to find any other outlet.

Q. 15. And the prices that were allowed you for that ore were, to your knowledge, at that time, the current market price for that kind of ore?

Objected to. Question withdrawn.

By Mr. Stockton:

Q. 16. Will you state when you first prospected the Yolo ore body?

A. Well, I should say somewhere about the first of July. It is hard to say just what that question means. We shipped a car of ore which really was part of what we subsequently called the Yolo ore body.

Q. 17. In other words, you found zinc ore in your workings?

A. Yes, back in April, 1914, or thereabouts.

Q. 18. And when did you learn there was any substantial body of ore there?

A. Not until after the first of July, 1914.

Q. 19. Now, I want to ask you in respect to a matter which was asked of you by Mr. Jerome as to the question of your production of copper. When did you slow down on the production of copper and smelting of it?

A. It was shortly after the opening of the European war. I think in late September or early October.

[fol. 404] Q. 20. Will you tell the Court as closely as you can exactly what that slowing down amounted to; what did you do?

A. It meant the operation of two blast furnaces instead of three, which we had been operating previously, and it also meant the reduction of the extraction from the mine accordingly and the stopping altogether of development work temporarily in the Mammoth mine.

Q. 21. And when did you resume that full blast on copper, if at all?

A. I think the latter part of December or early in January. That is December, 1914, or early in January, 1915.

Q. 22. Will you state, Mr. Metcalf, during that period of time what was your production of zinc—was it the lowest production or the highest during the period you were producing limited copper?

A. That was about just our lowest production of zinc, at the same time as our lowest production of copper.

Q. 23. The lowest production of copper and zinc were coincident?

A. Yes, sir.

Q. 24. Just about the same time?

A. Just about the same time, yes.

Q. 25. Did you ship to Beers, Sondheimer & Company all of the ore that was produced in the Mammoth mine, beginning with the period say September to February 1st?

A. Yes, all that was applicable to the contract.

By Mr. Sutro:

Q. 26. And that included all zinc crude ore?

A. Yes.

[fol. 405] By Mr. Stockton:

Q. 27. Can you state rough-y what you sent in November, in round figures?

A. Roughly it was about 230 tons.

Q. 28. And in December?

A. In December about 82 tons.

Q. 29. And in January?

A. About 200 tons.

Q. 30. Then in February?

A. Then we had started in February and were on our full scale and got our production up to nearly 500 tons in February.

Q. 31. Were there any conditions in your sorting plant or picking plant that kept you from producing a greater quantity of ore in October?

A. Well, we had not really learned how to sort the ore properly in October.

Q. 32. Your production at that time, Mr. Metcalf, I believe you already testified, was devoted solely to the table which you call Plant No. 1?

A. Yes.

Q. 33. Did you at any time before the completion of the complete Plant No. 2 put in any additional tables?

A. Yes, as early as 1915 we put in the second table, so our men that were sorting could sort continuously.

Q. 34. Sorting a greater quantity of ore?

A. Yes, it did not mean employing more men, it meant——

Q. 35. When was that?

A. That was in the latter part of January or early February.

— 36. I want to ask you, Mr. Metcalf, what was the effect of the rise or fall of the zinc market upon the production of ore under the Beers, Sondheimer contract?

A. Well, it had practically no effect. That is, we were engaged in developing the ore body; we were not so much interested in making money immediately at the time we were developing, as getting the things into such shape that we could eventually make money.

Q. 37. Mr. Metcalf, what would be the actual effect, for instance, of a rise, we will say of one cent—quotations are in cents per pound?

A. Yes.

Q. 38. For instance, if it is quoted as five cents, that means five cents a pound?

A. Yes, sir.

Q. 39. Now, what would be the effect of a rise in price of one cent per pound under the terms of the Beers, Sondheimer contract?

A. Well, with ore like ours running 40% zinc, it would contain 800 pounds of zinc, and if that zinc was worth one cent a pound more, that would be \$8 more value for the ton of ore containing 800 pounds of zinc.

Q. 40. Who would get the \$8?

A. Well, under the terms of the Beers, Sondheimer contract, for a one cent rise in the price of zinc, they would pay us \$5 of that \$8 and keep the balance themselves.

Q. 41. Have you made any figures of the cost of production, Mr. Metcalf, any estimates of the cost of production of zinc ore for the period from say the date of signing this contract until February 1st?

A. Yes, I have.

Q. 42. Will you state what they are?

A. Well, roughly, the result of our mining and sorting zinc ore for the months of October, November and December was a loss to us of slightly less than ten thousand dollars.

Q. 43. How was that?

A. Why, it was because while we were developing the mine the ore was of lower grade than the ore which we subsequently got. That is, in developing workings we could not work exclusively in ore, but had to mine ore and waste mixed. The result was that our recovery of valuable products was a less percentage, and in [fol. 407] addition to that the price of zinc was low during that period. Also our output was limited by the fact that we were not ready to stope, and by the fact that we had not our sorting plant completed.

By Mr. Sutro:

Q. 44. Mr. Elkan testified, Mr. Metcalf, at the time the contract was repudiated, I think he said as much as three to four thousand tons a month—what was the maximum tonnage you shipped in any one month?

A. I have not specially looked that up, but to the best of my recollection we did not ship over 2,000 tons a month; that can be checked up readily from the exhibits in the case.

Q. 45. You wanted to make a statement, you told me you had not been asked about those plants; that you wanted to state the exact facts to the Court as to where they were made?

A. The picking plants were actually made in Kennett.

Q. 46. After you received that letter from Mr. Salinger, asking to send as much ore as possible, will you state to the Court whether you rushed the completion of the picking plant, to hurry it up?

A. We did.

Cross-examination by Mr. Jerome:

Mr. Jerome: Will you produce, please, the letter of the United States Smelting Company of the 25th of March, 1915, to the American Metal Company?

Mr. Sutro: It is in evidence, it is Plaintiff's Exhibit No. 87. Here it is.

Mr. Jerome: Now, I offer in evidence letters, March 29th, 1915, [fol. 408] and April 1st, 1915, by the American Metal Company, Limited, to the American Metal Company, Limited.

Objection overruled; exception.

Marked Defendants' Exhibits X and Y of this date.

Mr. Jerome: I will offer two telegrams (shows same to Mr. Sutro).

Objection overruled; exception.

Telegrams received and marked respectively Defendants' Exhibit-Z and A-1 of this date.

Briefs to be submitted to the Court by Thursday evening.

[fol. 409] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

**Testimony Taken at Hearings Before Wallace MacFarlane, Esq.,
Special Master**

Before Wallace MacFarlane, Esq., Special Master

26 Liberty Street, New York,
Wednesday, September 8, 1920—2.30 p. m.

Appearances: Charles W. Stockton, Esq., and K. E. Stockton, Esq., Attorneys for Plaintiff; William Travers Jerome, Esq., and Harland B. Tibbetts, Esq., Attorneys for Defendants.

[fol. 410] Mr. Stockton: I offer in evidence the following depositions taken on behalf of the plaintiff—John C. Rix, of the City of Rochester, State of Nevada; O. W. Barr, J. W. Hodge and William H. Hubbard, all of the City of Kennett, California; Roy W. Buick, of the City of Alameda, State of California, taken at San Francisco, California, in Room 1201, 200 Bush Street, commencing January 26, and continuing thereafter from day to day until completed. The name of the notary is Frank L. Owen.

In connection with the deposition of John C. Rix, at page 7, I offer in evidence the exhibit there identified as Plaintiff's Exhibit 16.

(The objections of the defendants to the exhibits, as offered, and the Master's rulings, are reserved until the defendants have had an opportunity to examine the exhibits and formulate their objections.)

In connection with Mr. Rix's deposition, I also offer in evidence Exhibit- 17-a to 17-aa; Exhibit 17-aa is identical with Plaintiff's Exhibit 22-4, at pages 15 and 16; also Exhibits 18-1 to 18-5 at page 116; Exhibit 18-a to Exhibit 18-f, inclusive, page 18; Exhibit- 19-a and 19-b, two books, page 20; Exhibit- 20-1 to 20-7, page 24; Exhibit 21, page 53; Exhibits 22-1 to 22-70, inclusive, page 55; Exhibit 23, pages 66-67; Exhibits 24-1 to Exhibit 24-98, page 70; Exhibit 25-1 to Exhibit 25-15 inclusive; the typewritten transcript of that is Exhibit- 25-a to 25-p; Exhibit 25-1 to Exhibit 25-15 is on page 71; Exhibit 25-a to Exhibit 25-o is on page 116; Exhibit 25-p is on page —; Exhibit 26-1 to Exhibit 26-6 is on page 97; Exhibit 27-1 and Exhibit 27-2 is on page 103; Exhibit 28-1, and Exhibit 28-2 at [fol. 411] page 104; Exhibit 29 at page 105; Exhibit 30 at page 109; Exhibit 31, already in evidence, referred to on page 113; Exhibit 32-1 to Exhibit 32-9 at page 117; Exhibit 33 at page 196.

In Barr's deposition—Exhibit 34-1 to Exhibit 34-32 at page 260; Exhibit 25-1 to Exhibit 35-46 at page 261; Exhibit 36-1 to Exhibit 36-100 at page 261; Exhibit 37-1 to Exhibit 37-6 at page 262.

In Leslie's deposition—Exhibit 38-1 to Exhibit 38-4 at page 323; Exhibit 38-5 at page 326.

In Maritz's deposition—Exhibit 39-1 to Exhibit 39-4 at page 349.

I offer in evidence the following depositions taken on behalf of the plaintiff—Edwin Anderson taken at Denver, Colorado on February 5, 1920, before L. A. Dick, notary public. In connection with that deposition I offer Plaintiff's Exhibit 40 which is attached to the deposition.

I offer in evidence the following depositions taken on behalf of the plaintiff—Louis A. Bainter; Noel B. Boulware; Arthur E. Curtis; F. H. Dodd; O. O. Mitchen; Melvin N. Mortitz; George H. Rankin; all taken at Kansas City, February 7, 1920, before Georgie Williams Snyder, Notary Public.

I offer in evidence Exhibit 41-1 to Exhibit 41-29 in the deposition of Arthur E. Curtis.

I offer in evidence deposition taken on behalf of the plaintiff of Carl N. Ball, taken March 21, 1920, at New York City, N. Y., before Harold E. Herrick, notary public.

I offer in evidence deposition taken on behalf of the plaintiff of George L. Olmstead, taken at New York City, March 6, 1920, before Harold E. Herrick, notary public.

[fol. 412] I offer in evidence deposition taken on behalf of plaintiff of W. L. Renner, taken at New York City March 5, 1920 before Harold E. Herrick, notary public.

I offer in evidence depositions taken on behalf of the plaintiff of Wilson Hal Cordes, G. W. Cushing, V. B. Hjortsberg, taken at Salt Lake City under date of January 20, 1920, before Clarence Cramer.

Adjourned to September 27, 1920, at 10.30 A. M.

26 Liberty Street, New York City,
September 27, 1920—10.30 a. m.

Same appearances:

Mr. Jerome: I object to the admission in evidence of the entries in Plaintiff's Exhibits 38-3 and 38-5 each separately on the ground that it has not been shown that Kindleberger, whom the testimony shows made those exhibits, is either dead or insane, or without the State, and therefore those exhibits are objected to as incompetent. The same exhibits are separately objected to on the ground that they do not state facts, but that they state conclusions from processes, and that they are in substance, therefore, the opinion of Kindleberger, and not an entry of facts and therefore incompetent.

I will say that as to the day assay books, Exhibits 38-1, 38-2 and 38-4, we interpose no objection.

[fol. 413] We object to the admission in evidence of the entries in Defendants' Exhibits 39-1, 39-2, 39-3 and 39-4. Each and every entry is objected to upon the ground that no adequate proof authenticating such entries has been given to render them competent to be admitted in evidence.

Mr. Tibbetts: We object to the admission in evidence of the entries in the so-called Altoona Laboratory Book, Plaintiff's Exhibits 43-1 et seq., and the other Altoona Laboratory Book Exhibits 45-1, et seq., and the Exhibits 48-a to 48-f, and Exhibits 44-1 to 44-5, and Exhibits 49-1 et seq., all of these exhibits being laboratory reports or assay certificates kept at Altoona, upon the ground that they are incompetent; that they were not sufficiently authenticated; and we object on the same ground to the admission in evidence of the entries in the various Iola Laboratory reports or assay certificates, namely, Exhibits 41-1, et seq., Exhibits 42-1 et seq.; Exhibits 46-1 et seq.; and Exhibits 47-1 et seq. We make the further objection to the Iola reports or certificates which I have specified above, upon the ground that the evidence shows that the entries contained in these exhibits were transcribed from laboratory note books kept by the various chemists and which have not been produced, and which we contend were the books of original entry as to these matters.

We object to the admission in evidence of the following exhibits upon the ground that they are incompetent, irrelevant and immaterial, and that no proper foundation has been laid therefor:
[fol. 414] Plaintiff's Exhibits—

13,
13aa,
14,
15,
16,
18a to 18f,
18-1 to 18-5,
19a and 19b,
21,
23,

25-1 to 25-15,
 25a to 25p,
 27-1 and 27-2,
 28-1 and 28-2,
 29,
 30,
 31-1 to 31-33,
 33,
 38-1 to 38-5,
 39-1 to 39-4,
 40,
 41-1 to 41-29,
 42-1 to 42-64,
 43-1 to 43-65,
 44-1 to 44-5,
 45-1 to 45-33,
 46,
 47,
 48a to 48f,
 49 et seq.,
 50.

[fol. 415] The master received the exhibits provisionally, subject to objections and exceptions as to each exhibit until he had a greater familiarity with the facts of the case. At the close of the whole case the master ruled that all the exhibits above enumerated were admissible, and that defendants should be considered to have accepted separately to the admission of each and every exhibit objected to.

As to Exhibit 13—the “Ores received book, No. 1” kept at Kansas City, we contend that this is merely a compilation taken from other records, some of which are not introduced at all, such as certain unloading reports which were referred to, from which entries of wet weight moisture and so on were taken, and that other records, from which this book was made up are not properly authenticated. For example: A witness has testified that the zinc analysis figures which he entered were given to him by Mr. Eardley; Mr. Eardley has not been called on the subject; and upon the further ground that ultimately some of these analyses and assay figures are based upon the chemists’ reports and certificates which are deficient as we pointed out previously.

The same objections would apply to Exhibits 13-aa and Exhibits 14 and 15, which are all sheets from the “Ores received book” and “Ores purchase book.” As to Exhibit 16, which is a tabulation of zinc ore refused at Bartlesville, and the attached groups of settlement sheets, we contend that this is incompetent because based upon, partly upon the deficient proof of the assays and analyses; that there are figures for freight included which have no evidence to support them; [fol. 416] that as to the settlement sheets received from the United States Smelting Company, that these are based upon assays and

analyses not properly proven; that these are taken from unloading reports, not in evidence; and that the assays for zinc in the one set of sheets which purport to be based upon determinations at Kennett show a discrepancy from the zinc figures based upon smelter determinations.

As to Exhibits 17-a to z, et seq., Exhibit 22-1 to Exhibit 22-70; Exhibit 24-1 to 24-98; Exhibit 26-1 to Exhibit 26-6, we object that they are incompetent, irrelevant and immaterial, and that no proper foundation has been laid therefor; that it affirmatively appears from the evidence and other exhibits that the weighing of the various carloads of zinc was inaccurately and incorrectly done, and was therefore no proper evidence of the weight of the various shipments from the mine.

As to Exhibit 18-a to 18-f, which are assay sheets, prepared by the accountants Rix and Wenzl, based upon assay and analysis figures, contained in the day books, we object upon the ground already stated as to the day books and furthermore as to the ore in bins C and D, the evidence was insufficient.

Exhibit 18-1 to Exhibit 18-5 are typewritten transcripts of Exhibit 18-a to Exhibit 18-f, and our objections are therefore similar.

Exhibits 19-a and 19-b, which are assay record books were transcribed, according to the evidence, from the assay day books, the analytical day books at Kennett. Our objection to these, first, on the same ground as our objections to the day books, and, second, that some of the day books, that one of the analytical day books is missing [fol. 417] ing, and therefore there is no evidence for the entries based upon that book; that there are missing pages from another of the books, and that if the Kindelberger assay day books are excluded there would be no foundation for entries based upon them.

As to Exhibit 21, which is a tabulation of group 2, that is the zinc ore which was put in stock and later shipped and two sets of settlement sheets attached, our objections are similar to the objections stated to Exhibit 16 and the further objection that the testimony does not sufficiently establish that all the ore referred to in the tabulations was actually shipped and smeltered.

As to Exhibit 23, which is a tabulation of group 3—zinc ore shipped direct to the United States Smelting Company—and attached sheets, our objections are similar to those to Exhibits 16 and 21.

As to Exhibits 25-1 to Exhibit 25-15, which are assay sheets, our objections are similar to those to Exhibit 18.

Exhibit 25-a to Exhibit 25-p are typewritten transcripts of Exhibit 25-1 to Exhibit 25-15 and so are subject to the same objection.

As to Exhibit 27-1 and Exhibit 27-2, which are tabulations of freight deducted, we object that if the freight is to be taken into consideration there is no competent proof of the freight rates, and if it is eliminated that the measure of damage adopted is erroneous, and that these tabulations are therefore incompetent, irrelevant and immaterial.

As to Exhibit 28-1 and Exhibit 28-2, similar objections to those [fol. 418] stated in regard to Exhibits 27-1 and 27-2 are made.

Exhibit 29 is merely a tabulation showing the amount claimed in

suit. We object that it is prepared on an erroneous basis, and upon the ground that if the freight differences are eliminated, of course this tabulation is incompetent.

Exhibit 30, a tabulation of residue proceeds, our objection is that no sufficient foundation has been laid for it, no proper evidence of the facts which are involved.

Exhibit 31-1 to Exhibit 31-33, which cover the ore received and paid for by Beer-Sondheimer, that that is immaterial.

Exhibit 32-1 to Exhibit 32-9, a summary of weighmasters' reports, Exhibits 17, 22 and 24; are subject to similar objections.

Exhibit 33, sheet headed "Product of Bin C" we object that it is not sufficiently identified or proved. Exhibit 38-1 to Exhibit 38-5 are the assay day books which we have already referred to.

Exhibit 39-1 to Exhibit 39-4 are the analytical day books.

Exhibit 40 is the sheet of prices based upon Mr. Eardley's letter of July 21, 1915, which we contend is incompetent, irrelevant and immaterial.

I think all the remaining exhibits are laboratory reports and certificates, except Exhibit 50, and are covered by objections already made. As to Exhibit 50 we reserve our objections because it is not yet available.

As to exhibits introduced in the deposition of George Blow we wish to reserve our objections for the present until we have had an opportunity of examining these exhibits.

[fol. 419]

(Hearing Resumed)

26 Liberty Street, New York,
September 28th, 1920—2.15 p. m.

Appearances, same counsel as before.

GEORGE W. METCALF, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Chas. W. Stockton:

Q. Mr. Metcalf, were you employed by the Mammoth Copper Mining Company?

A. I was.

Q. For what period of time?

A. From November, 1909, to about January 1st, 1917, I think, and subsequently by their successors in interest, the United States Smelting, Refining & Mining Company, by whom I am still employed.

Q. What year was that?

A. November, 1909.

Q. In what capacity were you employed, and at what point, during the years 1914, 1915 and 1916?

A. I was manager of the Mammoth Copper Mining Company, at Mammoth, California.

Q. The properties you managed, included what?

A. The Mammoth Mine and Smelter, and certain smaller surrounding mines which we owned and sometimes operated.

Q. All in the vicinity of Kennett?

A. All in the vicinity of Kennett.

Q. You are familiar with the terms of the contract between Beer, Sondheimer and Company—

A. Yes.

[fol. 420] Q. You have already testified as to that?

A. Yes.

Q. The making of it, and your understanding of it?

A. Yes.

Q. Will you state in a general way—but first, were you in charge of all the operations of the Mammoth Copper Mining Company at Kennett?

A. Yes.

Q. Including the production and shipping of ores?

A. Yes.

Q. Will you state, Mr. Metcalf, the regular procedure in the way of production of any ore shipped to Beer, Sondheimer & Co. under this contract?

A. Well, the ore as mined from the mine was generally too low grade to ship under the contract, so we brought it down to the smelter and passed it through our zinc sorting plant at the smelter. It was brought to the last stage of its trip down from the mine, so in reality the cars at the smelter were dumped into a bin and taken out from that bin in small cars, and taken direct to the zinc sorting plant; at the sorting plant it was crushed, the fines screened out, the coarse passed on to a traveling belt, and the portion of it that was thought to be high enough in zinc to come within the contract terms was picked off and put into a bin by itself. The fines in the early stages of our operations, were dropped into the different bins and taken from that, either for direct loading into cars, or for the stock pile, as the case might be.

Q. At that time no assay or analysis of the ore was made?

A. No.

The Master: He means no assay had yet been made.

[fol. 421] The Witness: Yes; at the time we made rough mine samples, because occasionally we found a little ore that was high enough to ship without being picked, but so far as the ore at the sorting plant, any definite quantity of ore was concerned, we had no assays up to that point. Then the coarse ore from the bin at the sorting plant, as that bin, became full, was drawn off into a railroad car, and at the time when this was drawn off, a sample was taken—shall I describe the taking of the sample? It has already been described.

The Master: I wish you would let us have your continuous story of the operation.

The Witness: Very early in the stage of our operations, we would take a grab sample from this ore, and in a few days, we installed iron chutes through which this ore was loaded into the railroad cars.

Q. For shipment?

A. For shipment, or to go into the stock pile, as the case might be, and in the bottom of this iron chute there was a slot cut and a certain portion of the ore that went into the chute, instead of going into the railroad car, would fall through this slot and be directed into a small bin like a box on a platform there, and that constituted the sample of the ore which at the same time ran into this railroad car. Then the railroad car containing this ore was taken by our train crew conductor who, during most of this period, was R. W. Buick, who has testified in the case, and placed on the scale and weighed, the car being weighed before the ore was put into it and also afterwards so as to get the weight of the ore.

[fol. 422] By the Master:

Q. Will you state what was done with it at the scale and afterwards?

A. At the scales, during most of the time in question, O. W. Barr was weighmaster, however during a portion of the time R. W. Buick was weighmaster and during a portion of the time J. W. Hodge was weighmaster, and the weighmaster, whichever of the three he was, weighed this car light and loaded on a Fairbanks scale with a recording beam, which beam, by pushing a lever, recorded both the light and loaded weights.

Q. On a card?

A. On a card, a scale ticket, they call it. The weighmaster would subtract the tare from the loaded weight, thus obtained, and enter the weight.

Q. The net weight?

A. Under the net weight on his daily weighmaster's report, giving also on that report such other information as he had about the car.

Q. Well, the reports indicate what that was?

A. The reports indicate what it was. This report the weighmaster signed either at the end of that day, or at the beginning or early the next day, and took the report up to the main office of the company where it was turned over to the accounting department, the metallurgical branch of the accounting department, to supply them with the information on that report for whatever purpose they needed it.

Q. If the car so weighed was to go to stock, as you say, what was done with it?

A. If the car was to go to stock, the train crew under, generally under Conductor Buick, hauled it away, and it was unloaded in the yard into the stock pile.

Q. If it was to be shipped to some purchaser, what was done with [fol. 423] it?

A. If it was to be shipped to some purchaser, the weighmaster

made out a bill of lading for the car, took several copies, several duplicate copies, and took all those copies to the local station of the Southern Pacific, and had them signed by the agent of the Southern Pacific, and brought all of these copies but one, back to the main office.

By Mr. Stockton:

Q. And what was done with the car?

A. The car was delivered to a spur close to the Southern Pacific main line, from which the Southern Pacific train crews took them.

Q. Will you tell us about the sample, from where it was taken?

A. I haven't quite finished about the shipments. It happened occasionally that an order—it happened often—that in order to load a car to the maximum weight of 55 tons per car, which we were trying to do at that time, and at the same time have the contents of the car such that it would be high enough in zinc to be applicable either to the Beer, Sondheimer contract, or to our arrangement with the United States Smelting Company, that we would have to put into that car a certain tonnage from two or more different lots of ore, getting the right stock into the car in the right quantity, and that was primarily up to our smelter superintendent, Mr. Kirwen, and he would give the scale master instructions as to how much of a certain particular lot of ore to put into that particular car. When the car was first empty, he would tell the train conductor to get a certain specified amount of some particular ore. The train conductor would [fol. 424] take the car away, get that ore and bring it back to the scale, where it would again be weighed.

Q. Let me interrupt you right here that ore he would designate by plant lots?

A. Yes, he would designate them by plant lot, or by stock pile, or by some means that would identify it. And if he got the right amount, well and good; if not, corrections would have to be made; then he would send the car away again.

By the Master:

Q. By corrections, you mean by adding ore or taking ore away?

A. Yes, by adding or taking away ore.

By Mr. Stockton:

Q. He would then send the ore away again for some of the next lot required——

By the Master:

Q. The same car?

A. The same car.

Q. With the partial load upon it?

A. With the partial load, and bring it back; and the weighmaster's reports were intended, and I think in all cases did——

Q. You may leave that out, "I think," and you can state in the course of business what purported to take place?

A. They were supposed to show the weight of each of these particular sorts of ore that went into the car, as well as the combined weight of all the lots in the car when shipped out. Now, as to the sample—

[fol. 425] Q. (Interrupting.) You left it in the box under the iron chute?

A. Yes, the sample mill foreman was very frequently present when that sample was drawn, he was not absolutely required to be, he or men under him, were required to look after that sample after it was drawn. He, with men under him—he didn't do much of the manual labor himself—would shovel this sample from this box bin onto to a railroad car, generally a flat car. He kept a list of all the plant lots that were handled this way, and was supposed to keep them numbered in numerical order—

Q. Just one minute, what was a plant lot?

A. A plant lot was—during most of this period—a plant lot was an arbitrary division representing the one drawing of ore out of one of these bins—that constituted a plant lot.

By Mr. Stockton:

Q. Was it given a number?

A. It was given a number.

Q. Was it kept in such a way that the ore allocated to that particular lot could always be identified while it was in your possession?

A. It could, so long as it was in our possession.

Q. This sample foreman gave this plant lot number?

A. Yes.

Q. To a given lot on a car from which a sample was taken in the manner you have described?

A. Yes.

Q. Go ahead, what did he do with it, but tell us first, about how much of it there was?

A. Oh, there would probably be about a ton of this sample.

Q. That would be ore?

[fol. 426] A. Yes. When this sample was loaded onto the car he would switch this car up onto a different track, where it could be unloaded into the sample mill, which was a succession of mechanical means for crushing and automatically cutting out a certain definite part of this sample, so as to finally get a comparatively small quantity of ore which would accurately represent the whole body of the sample they started with. Now, this sample, after passing through this automatic machinery, was further cut down by this sample mill foreman and his assistants, until finally it would be a comparatively small amount of very fine material, called sample pulp, so fine that practically all of it would pass through a hundred mesh screen. This pulp he would put in an envelop- marked with the plant lot number, and deliver this to the assay office, where it would be received by the chief chemist, or sometimes one of his assistants,

and the different chemists and assayers in the assay office would assay this pulp according to their respective duties. Each of these chemists or assayers kept a memorandum of the results he obtained by his work on this pulp in books which are in evidence, and have been called assay day books and analytical day books. At the end of each day the chief chemist, or, in his absence, his chief assistant, would copy the results from these assay and analytical day books into the assay record book. The chief chemist, either on the same day, or within a day or so thereafter would copy from this ore record book a succession of the results shown in the ore record book onto to a laboratory report——

[fol. 427] By the Master:

Q. Was there any printed form?

A. Yes, a printed form filled in by hand, and would deliver this laboratory report to the metallurgical division of our accounting department, for them to obtain from it such information as they needed.

By Mr. Stockton:

Q. Have you seen those forms of the laboratory reports?

A. Often.

Q. Now, it has been testified that they were destroyed from time to time. Can you say whether they contained a statement of the plant lot number to which the ore referred, from which the sample used was taken?

A. In all cases they gave exactly the same information that was in these ore record books, and where that information was the plant lot number they always contained it.

Q. Were they complete copies from the assay books?

A. They were supposed to be complete copies, I never personally compared them with the ore record book.

By the Master:

Q. They would have to have some system of plant lot number to enable the metallurgical department to assign them to the return from the weighmaster?

A. In all cases where the ore referred to plant lot number, they showed the plant lot number, but there were in these same certificates assays of many other ores, which may have been, in fact, certainly were of different identity.

[fol. 428] By Mr. Stockton:

Q. Can you specify what these other ores were?

A. They would contain the assays and analyses of any ores we would buy, as well as these particular ores we are selling, they might contain assays or samples of ore that we thought we might want to buy.

By the Master:

Q. All of our questions referred to the ore that is the subject of this investigation?

A. Yes.

By Mr. Stockton:

Q. Will you give the name of the sample mill foreman who took the samples?

A. Hubbard.

Q. And the name of the head chemists?

A. The head chemist was Mr. Ball, and his chief assistant was Mr. Leslie; do you want the others—

The Master: Those are all in the deposition.

Mr. Stockton: I simply wanted him to identify them.

The Master: I have seen their names in the depositions.

Q. And one plant lot number appeared on both reports?

A. It appeared on both reports, both the weighmaster's report and the assayer's.

Q. And the reports sent to the laboratory department, or, rather, the laboratory reports?

A. Yes.

[fol. 429] The Master: If you have finished interrogating Mr. Metcalf about the assaying of it, if he is familiar, from general observation and knowledge, with the series of compilations made out in the metallurgical department, he had better run right along over them.

Mr. Stockton: I will have him do it.

By Mr. Stockton:

Q. You were in general charge of the whole matter?

A. Yes.

Q. All of these matters, were they not, were either prescribed by you or permitted by you?

A. They were practically all made by my orders in the way that I prescribed.

Q. Will you state what the procedure was in respect to the carrying these through the different accounts—you might begin with the first, if you will, with the first entry in the accounting department?

A. I would like first to explain that the shipment of this zinc ore was something that we were just starting to do—

By the Master:

Q. You were really just starting to do it under the contract involved in this action, so you were really starting it on account of this contract, to fulfil this contract; and the initial system—

A. (Interposing.) The initial system until just about the time when they repudiated the contract, was not as good as the system used

later. The contract really provided that settlement should be made on their sampling.

[fol. 430] Q. On the buyer's sampling?

A. On the buyer's sampling, and the importance of our records being easily provable was not so great.

Q. Well, you may describe the method of accounting, that you prescribed, prior to the time of the repudiation of the contract, and then the changes that were made?

A. Initially, we simply tried to get a rough grab sample of the ore, which would be a rough approximation to its—well, I think I would cut out that rough, and say, which would be a fairly close approximation to its real analysis, to give us a check against the returns made to us by Beer, Sondheimer & Co.

Q. And that grab sample was used?

A. That grab sample was used.

Q. And purported to give you this approximation you speak of?

A. Yes, it did.

Q. What sort of forms were made out?

A. I could show you these forms.

Q. If you have samples right before you, you can call attention to them. Can't you get them for him, Mr. Stockton?

The Witness: Initially, we had no proper forms for the accounting department to enter this information on, and consequently we took the forms that approximated closest to what was right, which were forms like Exhibit 102-j—is that?

Mr. Stockton: No, just 102.

The Witness: Like 102, the form having been originally intended to show what happened to our bag-house dust.

Q. That form was adopted in the accounting department to the subject of these ores?

A. Yes.

[fol. 431] By Mr. Stockton:

Q. Will you state whether this was the first entry when the weight of the shipment and the approximate fineness and the metallic contents were brought together in your accounting department?

A. This particular sheet does not show shipments—I don't think this shows shipments of the — in this suit, but shows the shipment of certain ore, and it was the first entry in which all this information was brought together (the witness is referring to Exhibit 33).

By the Master:

Q. You are confining this just to the method of doing business?

A. Yes.

By Mr. Stockton:

Q. Following that time, Mr. Metcalf, when you later changed your system, what was the first record made?

A. We started a loose-leaf book from which the sheets 103-a have

since been taken, there being sheets in this book adapted to show the entire work of the sorting plant, both the weight, the assay and analyses of all ores that went into the plant, and of all products that came out of the plant.

By the Master:

Q. Those sheets are made up in your metallurgical accounting department from the laboratory reports and the weighmaster's reports [fol. 432] and the bills of lading, where they show a shipments, and are there any other sources of original information besides these three?

A. I think that is all.

Q. Can you fix the time when this new form of accounting sheets was established?

A. We started using this new form of sheet in May, 1915.

Q. That was subsequent to the time of this alleged repudiation of the contract?

A. Yes.

By Mr. Stockton:

Q. Which repudiation occurred on what date, approximately?

A. It was in March, 1915.

Q. In the regular course of your business, Mr. Metcalf, what other records or compilations were made concerning the handling of this ore, after it was entered upon the sheets Exhibits 101 and 103?

A. This series of sheets, 18-a to f, inclusive, shows the make-up of the ore lots that were shipped to Beer, Sondheimer & Co., showing the shipment lot numbers in each case, and in most, if not all cases, the plant lots from which those shipment lots were composed and the weights and analyses—all these plant lots and the weight of each particular plant lot that went into a given shipment lot.

By the Master:

Q. Right there, tell us who determined the identity of a shipment lot, who gave the number, evidently the shipment lot is different from the plant lot, is a number?

A. The shipment lot number was given by the weighmaster on instructions from the cashier, all shipment lots being numbered consecutively.

[fol. 433] Q. Does that mean that when a lot of ore was to be shipped to a purchaser, that the cashier told the weighmaster about it and gave him a number with which to start, as a shipment number?

A. Yes, it does mean that, to start with.

By Mr. Stockton:

Q. The shipment numbers were numbered consecutively?

A. They were numbered consecutively.

Q. Will you proceed to explain the difference between the two shipment lot numbers?

A. I will keep the whole thing in consecutive order, if I may, and postpone that until later.

The Master: Do it your own way.

The Witness: Should I explain where the information comes from, that goes on this sheet?

By Mr. Stockton:

Q. Yes, and the person who gave it?

A. I have already explained about the shipment lot number, and how the weights of the individual plant lots were obtained by the accounting department from the weighmaster's reports and the assays of each individual plant lots were obtained by the accounting department from the laboratory reports, and the combined analysis, being the bottom figures given under the heading of each shipment lot. That was calculated by the metallurgical division of the accounting department. Messrs. Rix, or Wendell did that work. The Exhibits [fol. 434] 25-1 to 25-15, inclusive, gave this same information, as to the lots that were shipped direct to the United States Smelting Company; but on this series of sheets in some cases; instead of the ore being made up from a number of—the contents of a car being made up from a number of different plant lots, the contents of the car is stated to come entirely from a certain bin. That ore that came from such bins is ore that was placed in stock——

By the Master:

Q. That is, ore bins C and D?

A. Ore bins C and D is ore that was placed in stock at Kennett after the time when Beer, Sondheimer & Co. refused to accept any more ore, and when we stopped shipping it to Beer, Sondheimer & Co. and before the United States Smelting Company undertook to receive our ore.

By Mr. Stockton:

Q. In other words, it was stored there while you were looking for a market?

A. Yes. On these exhibits 25-1 to 25-15, the shipments are numbered consecutively, commencing with No. 1. The shipments that were made according to Exhibits 18-a to f to Beer, Sondheimer & Co. at Bartlesville, were also numbered consecutively, I think, beginning with number 35, the previous numbers in that series having been ore that Beer, Sondheimer & Co. received and paid for. This ore that was refused at Bartlesville was unloaded into a stock pile at Bartlesville, and was shipped from Bartlesville to Altoona, being [fol. 435] given a new series of lot numbers, as it was shipped from Bartlesville, beginning with lot No. 1. The shipments from Kennett to Altoona, whether the daily product or from the stock pile, were all numbered consecutively, beginning with No. 1, as they went out

from Kennett, but in preparing the statements showing the shipments as shown in Mr. Rix's deposition, he divided these shipments into those that went direct to the United States Smelting Company as produced from the zinc plant and from those that had been put into the stock pile first and were reloaded for shipment.

Q. Let me understand you on that, Mr. Metcalf, the plant lot number on those shipments would be No. 1, in the first instance——

A. There would be no plant lot number shown on the shipment, except that on these sheets, the 18 series, and the 25 series, would be shown the plant lots from which a given shipment lot was composed.

Q. What became of the laboratory reports after they were sent to the accounting department?

A. They were kept for awhile, as long as they thought they would need them, until the file got too big, and then they would remove——

Q. (interrupting). Just explain what the file was.

A. The file was just a piece of board about six inches wide and ten inches high, with a couple of posts on top, that the laboratory reports were punched together on.

Q. And the last one was put on top?

A. The last one was put on top, and when it got so full that it was difficult to put any more on top of them, he would remove a bunch from the bottom and dispose of them.

Q. Didn't they remove them all?

[fol. 436] A. Why, commonly, no, they would just commonly remove enough so that there would be room on top left.

Q. And those were destroyed?

A. I so understood, I never saw these personally destroyed, but I had a similar file myself where I used to often get duplicates of these laboratory reports, and I personally destroyed my copies just that way.

Q. May I ask you how you regard that laboratory report, as a current file, or as a permanent record?

A. It was just an advice to the accounting department, it didn't purport to be anything but a copy of the assay record.

Mr. Tibbetts: I move to strike out of the previous the answer, "I so understood."

The Master: Motion granted. It is hardly competent testimony. You can ask Mr. Metcalf if he knows if there was a permanent record kept of the information in these laboratory reports, and what it was.

Mr. Stockton: I may ask him, may I not, what his instructions were—what was the intention——

Q. Can you state as to whether these laboratory reports were intended to be a permanent record?

A. It was not intended that they should be a permanent record.

By the Master:

Q. Was there a permanent record?

A. There was a permanent record.

Q. How did you distinguish that?

A. That was the assay record book from which these laboratory reports were copied.

[fol. 437] Q. And those are in existence?

A. Those are in existence, and in evidence in this case.

By Mr. Stockton:

Q. First, I would like to show you this Plaintiff's Exhibit 33, Mr. Metcalf, and ask you if it is not a fact that that represents the first records kept, showing the disposition of the product after you began to restrict your shipments to Beer, Sondheimer & Co., showing the product which went to Bin C?

A. It does.

Q. And then after it became evident that Beer, Sondheimer & Co., were not going to accept the product, did you find it necessary to adopt a more elaborate system of keeping accounts?

A. We did.

Q. And at that time, did you begin to keep the monthly production sheets, the 101 series and the 103 series?

A. Yes, we did.

Q. And subsequently did you abandon the keeping of any record in the form shown on Exhibit 33, and merely summarize monthly the products which went to the various stock piles in which you stored this ore, taking your figures from the monthly production sheets?

A. We did.

Q. And are these summaries, Exhibits 101-a, 101-b and 101-c summarizing respectively the contents of stock pile No. 1, Bin C and Bin D?

A. They are.

Q. Will you state whether there were any zinc fines shipped to the United States Smelting Company direct from Kennett, so far as knowledge is gained from examining all the records of the Company?

A. That would rather depend upon your definition of "fines."

Q. By "fines," I mean the product referred to on Plaintiff's [fol. 438] Exhibit 102, the screened fines?

A. There were no fines shipped direct to the United States Smelting Company at Altoona, except certain concentrates, which were shipped.

Q. But were there any fines shipped direct from Kennett to Altoona?

A. You might say that fines include——

Q. I am excluding any jig products or middlings, I mean screen fines?

A. No, never any screen fines shipped direct.

Q. Will you explain how the accumulation of fines purporting to be shown on Exhibit 102 arose in February, how you came to put these fines in the stock pile, if you know?

A. It shows on the face of this sheet that these fines ran too low

in zinc to be shipped direct to Beer, Sondheimer & Co. alone—shall I tell you what we did with them?

Q. Yes.

A. What we actually did with them was to mix them with the larger quantity of course ore which ran high enough in zinc, so that the average values of the shipments would be high enough in zinc to come within the terms of the Beer, Sondheimer contract and shipped them in that shape.

Q. Do you remember whether or not you received any request from Beer, Sondheimer & Company to ship fines as well as coarse materials?

A. I remember we received a complaint from them, because we had included the fines in these shipments, and as we wanted to please them as much as we could, we immediately discontinued any such inclusion of fines.

Q. Did you ship fines from that time on, either to Beer, Sondheimer & Company or to the United States Smelting Company?

A. We did not.

By the Master:

Q. There is one point that I want brought out about this course of business, that perhaps we haven't got quite clear, and that is this, how did the weighmaster, who got the shipping number merely from the cashier, identify the plant numbers of the stuff that he weighed? He must have gotten instructions from somebody to send a car up to be loaded for a shipment?

A. Yes.

Q. Now, how did he get the plant lot numbers?

A. He obtained the plant lot numbers from Mr. Hubbard, the sample mill foreman, who gave the numbers to these lots.

By Mr. Stockton:

Q. No, that is not his question, he means how did he know what plant lot numbers the shipment lot number was to be made up of?

A. He received these instructions from Mr. Kerwin, the superintendent.

Q. What would Mr. Kerwin, in the usual course of business, tell him?

A. Mr. Kerwin, for example, would say, "In this next shipment lot number, 40 for example, put in 25 tons of plant lot 15, and 30 tons of plant lot 60."

By Mr. Jerome:

Q. Would he say this to the weighmaster?

A. To the weighmaster.

[fol. 440] By Mr. Stockton:

Q. Can you tell in the ordinary course of business, what was the practice of mixing these plant lots, in certain proportions, what was the reason?

A. There might be several reasons.

By the Master:

Q. I suppose the point is, whether they were ore that came within the terms of this contract or not.

By Mr. Stockton:

Q. I just wanted to bring that out, and that the plant superintendent would get the assays first from the assay office——

The Master: There was a plant superintendent?

Mr. Stockton: Mr. Kerwin, the sample mill superintendent.

By the Master:

Q. Has it been shown that these different plant lots, as they were numbered by, I think the sample foreman,—the plant lots were numbered by the sample foreman?

A. Yes.

Q. Were they kept in separate bins?

A. Ordinarily, they would be left in the railroad car in which they were originally received, until they were either shipped in the same car, or transferred into another car for shipment.

[fol. 441] By Mr. Stockton:

Q. Or transferred to a bin?

A. Or transferred to a bin.

The Master: I want to have it appear entirely clear how the weighmaster's reports—the ore mentioned in the weighmaster's report, is connected with the particular plant lots, to which later in the metallurgical accounting department a particular laboratory accounting report is applied, you will have to show that connection, if it does appear, or I will take it out from the evidence, but if anything more is needed, let us have it now.

Q. Can you explain how, in the ordinary course of business, the weighmaster would know when a car was brought to him from the zinc plant, what plant lot number that lot had?

A. He would ordinarily have told the railroad conductor to get the ore out of the——

Q. (Interrupting.) No, I am asking when it is first brought from the zinc plant to him, as a plant lot, how does he know what plant lot number that is?

A. He has been told by Hubbard.

Q. Who was Hubbard?

A. The sample mill foreman.

Q. And he was the man who assigned the plant lot number?

A. Yes.

Q. What would be done with that car, ordinarily?

A. It would ordinarily be either set on one side for a day—

[fol. 442] Q. Put in the yard?

A. Put in the yard, or sent back to be filled with ore from some other plant lot.

Q. What would be the purpose of doing it, what would be done with it right away?

A. The purpose would be to load it to maximum capacity with ore of a purported grade, and to ship it out.

By the Master:

Q. For shipment?

A. Yes.

By Mr. Stockton:

Q. In other words, the plant lot, or the car containing that specific plant lot, was kept a short time, or else dumped in a bin and a record made of its being put in that bin on the weighmaster's report, is that right?

A. That is right.

By the Master:

Q. All of this ore first came on cars, before it was put in any bin; was it always weighed by the weighmaster before it was put in a bin?

A. Yes it was always weighed first.

By Mr. Stockton:

Q. As the plant lots came from the plant, a sample was drawn, and a lot was immediately taken down and weighed, a weight found, and then some specific use was made of that ore, it was either put in a bin and a notation made to that effect, or it was shipped and a notation made to that effect, on the weighmaster's report?

A. Yes.

[fol. 443] By Mr. Jerome:

Q. May I ask this here: Do these weighmaster's reports in evidence here show anything other than the weights as the ore was shipped?

A. Yes, they show the weights of the individual plant lots.

Q. Before being shipped?

A. Before being shipped.

Q. Then, afterwards, when the shipment was made up, the individual plant lots from which that carload was drawn and its aggregate weight, was shown?

A. I think not all in one place, Mr. Jerome.

The Master: You had better take a look at them.
The witness examines papers.

By Mr. Stockton:

Q. Mr. Metcalf, referring to these general forms of the weighmaster's reports, are they divided into two classifications, showing arrivals and deliveries?

A. They are.

Q. What do the arrivals indicate?

A. They indicate incoming ores or other materials.

By the Master:

Q. You mean coming from the mine?

A. They practically indicate anything weighed that was not shipped.

Q. As far as this case is concerned, they indicate ore coming out of your Mammoth Mine?

A. Coming from the zinc plant, yes.

[fol. 444] By Mr. Jerome:

Q. You discriminate between zinc plant and zinc mine?

A. No.

By Mr. Stockton:

Q. Now, was every plant lot weighed and the weight noted in the proper part of the weighmaster's report under the heading "arrivals"——

A. I can't personally say about that.

Q. Was that the custom?

A. That was the custom.

By the Master:

Q. That was what the form intended?

A. Yes.

By Mr. Stockton:

Q. Now, when the plant lot was combined with other plant lots and a shipment worked out, was it the same?

A. That was the intention of the form.

Q. Under the heading of delivery?

A. Yes.

By the Master:

Q. When you say the zinc plant, you distinguish that from the mine or the milling plant?

A. I mean the sorting plant.

By Mr. Stockton:

Q. With reference to Mr. Rix's calculations, Mr. Metcalf, will [fol. 445] you explain who gave Mr. Rix instructions as to the data which was to be used in making up those calculations?

A. I did.

The Master: What particular calculations of Mr. Rix are you referring to?

Mr. Stockton: I am referring to the calculation contained in Exhibits 16, 21 and 23.

Q. I am showing you Plaintiff's Exhibit 16. Can you tell what source you instructed Mr. Rix to draw on for data in computing the amount that would have been due from Beer-Sondheimer & Company under the terms of your contract?

A. In the case of this particular series, being the ore that was shipped to Bartlesville and refused, I told him to use the Kennett data, for the reason that that was all the data that we had or could have, under the circumstances.

Q. Will you explain how in computing the amount that would have been due from Beer-Sondheimer for this ore, it was necessary to take into consideration the time when the ore was produced and would have been shipped—was produced and shipped actually?

A. It was for the reason that the amount to be paid by the buyer depended largely on the market price of the zinc.

Q. At what time?

A. A certain period after shipment.

Q. No, you mean the date of the bill of lading?

A. The—

By the Master:

Q. As prescribed in the contract?

A. As prescribed in the contract, and in making out a bill at [fol. 446] all, it was necessary to consider the date of the bill of lading.

By Mr. Stockton:

Q. When this ore—when the ore covered by shipment lots 35 to 66 made to Bartlesville, arrived at Bartlesville, what was done with it there after Beer-Sondheimer refused to accept it?

A. It was unloaded into a pile on the ground.

Q. Was it unloaded in such a manner that the separate shipments originally, the Kennett shipment lots were retained, so that they could be identified?

A. No, it was not, it was all put in one pile, so that when picked up again and shipped to Altoona finally, there was no correspondence between the individual carloads going to Altoona and the individual carloads that had gone out of Kennett to Bartlesville.

Q. Have you made a computation of the average metal values as shown by your Kennett records of the cars which were sent from

Kennett to Bartlesville, and subsequently transshipped and sent to Altoona?

A. Yes.

Q. Have you made up an average of the metal values as taken from the Kansas City settlement sheets of the same ore which was received at Altoona from Bartlesville?

A. Yes, I have.

Q. Have you compared those two averages?

A. Yes, I have.

Q. Do they check?

A. They check quite well.

Q. Within what limits—have you the computations with you?

A. I am not sure whether I have, or whether I gave them to you.

[fol. 447] Mr. Stockton: I would like to offer them as a tabulation for the information of the referee.

Q. From what did you make your computation of the Kennett, of the average values as shown by the Kennett record of these shipments?

A. From the statements prepared by our metallurgical accounting department, showing what those analyses were on the individual lots.

Q. Is that statement in evidence?

A. Yes.

Q. What exhibit is that?

A. 16, Plaintiff's Exhibit 16.

The Master: Is Mr. Metcalf professionally qualified to make such a computation?

Mr. Jerome: Yes, anything that Mr. Metcalf swears to, I will accept on any subject.

The Master: You say that they did later, after this ore was shipped to Bartlesville to Altoona, get a settlement sheet?

Q. After this ore was shipped from Bartlesville to Altoona, did you receive settlement sheets from the United States Smelting Company purporting to show the weight and the metal analysis of that ore?

A. You said settlement sheets?

Q. Yes.

A. Yes.

Q. Did you make up your average which you have just referred to from those settlement sheets?

A. I did.

Mr. Stockton: Then I offer this table.

[fol. 448] The Master: Let him state what they were.

Q. Will you state what the average metal analysis as shown by your Kennett records was?

A. In zinc 38.2 per cent. and according to the Altoona records when averaged, it was 37.1 per cent. The comparison of weight shows on the face of the exhibit.

By Mr. Jerome:

Q. Is that a weighed average or an arithmetical average?

A. An arithmetical average.

By Mr. Stockton:

Q. Might I ask, Mr. Metcalf, why you need an arithmetical average instead of a weighed average?

A. Because it was easier and because the weights of the individual lots were so—individual carloads were so nearly the same that there would be very little difference between a weighed average and an arithmetical average.

Q. What would you consider would be the maximum difference?

A. Not possibly over two tenths of one per cent.

By the Master:

Q. Will you just state here, so that I can have it right at this point the difference between a weighed average and an arithmetical average, that calls for a designation of what the weighed average is?

A. A weighed average involves the determination of the amount [fol. 449] of metal in each particular lot of ore that you are considering, the adding of all those metals together in all the lots you are considering, and the dividing of that result by the total weight of all the lots you are considering, whereas the arithmetical average means simply adding the actual analyses of each of these lots and dividing the total by the number of lots.

Mr. Stockton: I ask that this sheet be introduced in evidence as Plaintiff's Exhibit 104.

The Master: I will take it as part of the testimony.

Mr. Jerome: For what it is worth.

The Master: For what it is worth.

By Mr. Tibbetts:

Q. As I understand it, the sheet which is now being offered does not show the details of your calculations as to the first two grades of ore, but merely results?

A. Yes.

Q. As to the third grade, it does show the details that went into the calculation, is that correct?

A. Yes.

The sheet referred to is received in evidence and marked Plaintiff's Exhibit 104.

By Mr. Stockton:

Q. I show you Plaintiff's Exhibit 21 and ask you if you gave instructions to Mr. Rix with respect to the data to be used in making [fol. 450] up the amount due from Beer, Sondheimer & Company

under the terms of this contract with the Mammoth Copper Mining Company?

A. I did.

Q. Will you state what data you told him to use?

A. I told him to use the Kennett figures as to weights and assays because we had to apply the prices of the metals at the time provided in the contract and would not know the tonnage on which to apply those prices any way but by applying each price for the tonnage which was then ready for shipment.

Q. In calculating the amount that would have been due from Beer, Sondheimer & Company on the various plant lots shown—or referred to in Plaintiff's Exhibit 21—can you state what date was used in calculating the date on which shipment would have been made?

A. We took the date produced as corresponding to the date of our shipment.

The Master: When you say "would have been made," you mean if the contract was not repudiated.

The Witness: Yes.

Q. At the time the contract was repudiated, were you making shipments under it as fast as you could produce the ore?

A. Yes, we were.

Q. After you commenced shipments to the United States Smelting Company, did you continue to ship to the United States Smelting Company approximately as fast as the ore was produced?

A. We shipped to the United States Smelting Company a little faster than it was produced.

Q. I am speaking about the plant?

[fol. 451] A. Yes, we shipped the current product as fast as it was produced.

Q. So that throughout the transactions the date of production was practically, while you were shipping regularly, the date of production was practically the same as the date of shipment?

A. Yes, it was.

Q. Now, did you make an average from the Kennett figures showing the analysis of the ore put in stock?

A. On Exhibit 21.

Q. On Exhibit 21?

A. Yes, sir, I did.

Q. And did you make an analysis as shown on this ore as shown by the United States Smelting Company settlement sheets?

A. Yes, sir.

Q. Are those averages—will you state what those averages were?

A. The average of the Kennett sampling and assaying of the lots on Exhibit 21 showed 40.97 zinc and the average of the Altoona samplings and the settlement assays on the same ore was 40.9 zinc.

Q. Did you make up an average, an average analysis, on the Kennett figures of the ore that was shipped direct to Altoona which is shown in Plaintiff's Exhibit 23?

A. I did, but in that case the Kennett figures do not appear on Exhibit 23, because on Exhibit 23 we made up what Mr. Jerome calls the hypothetical settlement sheet on the same weights and assays as the U. S. S. Co. settlement sheets.

Q. Did you also make an average of the United States Smelting Company returns?

A. I did.

Q. Of the ore that was shipped direct to Altoona?

A. Yes, I did, and including also the six lots that were shipped to Iola.

[fol. 452] Q. Are these analyses shown on Plaintiff's Exhibit 104—are these averages shown on Plaintiff's Exhibit 104?

A. They are.

Q. Will you state what they are?

A. The average of the zinc analysis shown on the U. S. S. Co. settlement sheets was 40.19, and the average of the zinc analyses of the different lots shipped from Kennett as shown on Exhibits 25-1 to 25-15 was 40.39 zinc.

Q. Now, Mr. Metcalf, will you state whether in your opinion it would have been practical to keep separate and distinct all the plant lots which you put in stock at Kennett after Beer, Sondheimer & Company refused to receive further shipments, and before you commenced shipping to the United States Smelting Company?

A. It would not have been practicable.

Q. Do you consider that it would have been practicable—

The Master: Just what do you mean by practicable, do you mean that they wouldn't have had room to do it?

Mr. Stockton: In the ordinary course of business.

The Master: Do you mean that there wouldn't have been room or bins enough?

Q. Would there have been bins enough, or would it have cost a lot to do it?

A. It would have cost a lot to do it, and we didn't have room enough, and the cost of the ore would have been very large if we had tried to put it in the sort of place that we did have.

[fol. 453] Q. Do you consider that it would have been practicable from the standpoint of cost or space, to keep separate the lots that were dumped at Bartlesville in order to preserve the identity of the shipment lots from Kennett?

A. I was never at Bartlesville, but as a general proposition, no such thing as that would have been practicable.

Q. Would it have cost more to do it?

A. Much more to do it.

The Master: Than the ore was worth, he means?

Mr. Stockton: More than preserving the identity of it was worth, that is what he means.

Q. Will you state why Exhibit 23, the Kansas City assays, were used in computing the amount that would have been due from Beer, Sondheimer & Company?

A. Because we thought that whenever we possibly could we should use the same weights and assays in figuring what Beer, Sondheimer & Company should have paid us, as we used in figuring the amounts actually paid us by the United States Smelting Company, that we would get a better comparison that way, and we desired to do that whenever it was possible.

Q. Did you make any efforts to find Mr. Kendelberger at the time of the taking of the San Francisco depositions?

A. Yes, I did.

Q. What efforts did you make to find out where to locate him?

A. I inquired of several people who I thought knew Mr. Kendelberger.

Q. Is he still employed at Kennett?

A. He is not employed at Kennett.

[fol. 454] Q. Was there any record at Kennett to indicate where he had been transferred?

A. No, he went from Kennett to the Army.

By the Master:

Q. Did he go abroad?

A. Yes, he went to France.

By Mr. Stockton:

Q. Have you any idea now of Mr. Kendelberger's whereabouts?

A. Yes, I rather think he is in California now.

Q. What do you base that supposition on?

A. One of my sons met him out there some months ago.

Q. Where?

A. In San Francisco.

Q. Did he state or indicate that he was located there or not?

A. I don't recall that he did.

Q. So far as you know he is residing outside of the State?

A. Yes.

The Master: At the time the depositions were taken there, was he still in France—what was the date of the California depositions?

Mr. Stockton: I don't know whether he was still in France or not.

The Master: When were the California depositions taken.

Mr. Stockton: January last.

The Master: Did you make any efforts to find out whether he was in California then?

The Witness: I did, but I did not succeed in learning at that time.

[fol. 455] By Mr. Stockton:

Q. Did you inquire of various sources that you thought likely in order to obtain his whereabouts?

A. Let me explain about that, we supposed that all that we were going to need was these assay record books, which we expected to prove by Ball and Leslie, and it was only in the course of the taking of the San Francisco depositions that it seemed to be necessary to

bring out these daybooks, and in the testimony on the daybooks it developed that we had to produce the man who actually made these day books and that we would have to have Mr. Kendelberger. From that time until we stopped taking the depositions, and Mr. Tibbetts and myself came back east there were only two or three days, and I made such inquiries as I could in those two or three days, but I did not locate Mr. Kendelberger, but with a longer time to do it I think I could have located him, I think he was somewhere probably in California at that time.

By the Master:

Q. Do you think you could locate him now?

A. I think so.

By Mr. Stockton:

Q. How do you expect to do that?

A. What I would do would be to have one of my boys out there start inquiries among Kendelberger's friends, and see if they could find him. I think he probably could.

[fol. 456] The Master: Do you think that under that testimony, that he is available?

Mr. Stockton: He is outside of the jurisdiction of the court.

The Master: Still, assuming that, I don't know whether that is enough. I think that in the Federal courts being out of the jurisdiction is accepted as sufficient, but whether it is in the State of New York or not, I really don't know.

Mr. Jerome: The rule in New York State, "Dead, insane or without the State," applies to the taking of deposition de bene if the witness is alive; he must either be shown to be dead or non compos mentis.

Adjourned to Wednesday, September 29, 1920, at 2 o'clock P. M.

26 Liberty Street, New York,
September 29th, 1920—2.15 p. m.

Met pursuant to adjournment.
Same appearances.

Examination of Mr. METCALF, continued.

Cross-examination by Mr. Jerome:

Q. Mr. Metcalf, in these various exhibits that we have had before us in the last two days, there are numbers designated on some of them as, for instance, on Plaintiff's Exhibit 18-a, the column under [fol. 457] the heading "Lot" in which there are numbers entered. On that same exhibit, taking Exhibit 18-a, there are in the column,

in this case under "Zinc sulphate," lots numbers—those refer to the same lot numbers, do they?

A. No, they do not.

Q. And what do the lot numbers in these exhibits under the column entitled "Lots" refer to?

A. On the Exhibit 18 series, they refer to the shipment lot number.

Q. On the Exhibit 18 series, where there are entries of lot numbers, not in the column headed "lot," what do they refer to?

A. They refer to plant lot numbers.

Q. And on Exhibit 18-c, in the column next to the zinc sulphate column, there is a series of numbers—to what do those refer?

A. I would have to look it up to make sure, but I think they refer to the page of the assay record book, in which the assays and analyses of the different plant lots appear.

Q. On this particular Exhibit 18-c, there is found in the column entitled "As." a lot of numbers. Those are again plant lot numbers, are they?

A. Yes.

Q. Where on the shipment sheets we find in the column "Lot" printed at the head of it, numbers, they refer to shipment lots?

A. On these eighteen series, yes.

Q. In Exhibit 18-a of that series of exhibits, 18-a to 18-f, the numbers in the column which has the printed heading "Lot" refer to shipment lots, do they?

A. Yes, sir.

Q. And wherever in that series of exhibits other numbers appear, simply the word "lot" in front of it, but not under the column with [fol. 458] "Lot" printed at the head, those refer to samples—or plant lots, rather?

A. That is correct.

Q. In the series of Exhibits 25-1 to 25-15, what do the numbers under the column with the printed heading "Lot" refer to?

A. They refer to shipment lots.

Q. And on those exhibits where there are other entries which have the word "Lot" written, and a number after it, and are not in the column at the head of which there is printed the word "lot," those refer to sample lots? Is that right?

A. To plant lots.

Q. Similarly, as you have testified in regard to the series of Exhibit 18?

A. Yes.

Q. In Exhibit 33, to what do the figures under the column with the printed heading "Lots" refer to,—plant or shipment lots?

A. They refer to plant lots.

Q. Looking at now the series of Exhibits 103-a to 103-f, I find in the column with the printed heading "Lot" numbers. To what lots do these refer?

A. They refer to the plant lot numbers.

Q. Is it true, then, in all of these exhibits which purport to show "Product," that the figures in the column with the printed heading

"Lot" refer to plant lots, but in the exhibits that have reference to shipment, the figures appearing in the column printed at the head under "Lot" refer to shipment lots?

A. I think that is generally true, but I have not looked at all these product sheets.

Q. Will you glance at them?

A. That is true of this 103 series of exhibits.

Q. And is it true of Exhibit 33?

A. It is true of Exhibit 33.

[fol. 459] Q. And of any other production series?

A. I think it is.

Q. Looking at the Exhibit 101-a to Exhibit 101-e, which purport to be production sheets, is it true that the numbers in that column with the printed heading "Lot" refer to plant lots and not shipment lots?

A. That is correct.

Q. And where, on any of these exhibits purporting to show product, we find entry of "Lots" with numbers, but not under the printed heading "Lot," is it true that they refer to shipment lots, or what do they refer to?

A. They refer to shipment lots.

Q. You have testified, if I understood you correctly, that the course of business which you directed to be installed here was that Mr. Hubbard,—he had charge of shipments, did he not?

A. No.

Q. What was his function?

A. He was simply the mill foreman.

Q. (Continuing)—Was that Mr. Hubbard in the course of business that you directed to be installed, was to communicate to the weighmaster the various numbers of plant lots that went on any car. How did the weighmaster get any information in regard to plant lots? What was the course of business that you directed to be established in that respect?

A. The original plant lot number was given to each lot by Mr. Hubbard, but the weighmaster did not get direct from Mr. Hubbard the information as to what plant lots to include in a certain definite shipment.

Q. From whom was he supposed to get that information?

A. He got the instructions from the smelter superintendent.

Q. And what was his name?

[fol. 460] A. Mr. J. H. Kerwin,—as to how much of what plant lots to include in a given shipment lot.

The Master: Is the shipment lot there, as you use it, synonymous with carload?

The Witness: Yes, in checking carloads.

Q. When the zinc ore came, and was placed in a bin, or in a pile, Mr. Hubbard's duty, as you had established the practice, regardless of whether he departed from it or not, Mr. Hubbard was to give that lot a plant number?

A. Yes.

Q. And when the weighmaster was going to make up a car, it was Mr. Kirwen's duty, as the smelter superintendent, to tell the weighmaster which lot, plant lot, he was to put in that car?

A. Yes, that is correct.

Q. When a number was given a plant lot by Mr. Hubbard, where was there any entry made of that number as applicable to that plant lot?

A. There were,—I would have to testify from the deposition, not from my own personal knowledge.

Q. Do you know of your own personal knowledge, not what they may have told you?

A. I know of my own knowledge that Mr. Hubbard entered that plant lot number on his sample envelope that went to the assay office.

Q. Do you know of your own knowledge that he did anything else beyond that?

A. I know that he and the weighmaster and the train conductor were in close conference there, and that all three of those men necessarily knew—

Q. (Interrupting) I want you to be very distinct now. You testified fully as to the course of business that you, personally in [fol. 461] charge, directed to be established. I am interrogating you now, not as to your inferences, not as to what necessarily might be outside of your own personal knowledge, something you heard or saw, or smelt, or touched. I am asking you to tell me of your own personal knowledge what Mr. Hubbard did; not what he ought to have done, or was ordered to do, but what Mr. Hubbard did after assigning a plant lot number to any given quantity of ore.

The Master: You mean to say, did he preserve the identity of that plant lot?

Mr. Jerome: What he did with the number, yes.

The Witness: My personal knowledge only goes to the existence of the plant lot numbers in his own writing on the pulp envelopes, some of which I saw.

Q. And that pulp envelope was the sample Envelope?

A. Yes.

Q. What he then did, or what course of practice he actually pursued in regard to a lot number, you don't know of your own knowledge, do you, or do you know?

A. No, I expect not.

Q. So far as you know, no further record of that sample lot number was made by Mr. Hubbard?

A. I know what record he told me he made, but I have not personally seen it.

Q. Do you know of your own knowledge whether he communicated any record, handed any record to the weighmaster or Mr. Kerwin, I mean something recorded, not by word of mouth?

A. Not of my own knowledge.

[fol. 462] Q. Do you know whether he told Mr. Kerwin or the weighmaster anything in connection with that lot number?

A. I never heard him tell anyone, but I have been told by people he told.

Q. Now, in the course of business as you directed to be established in regard to these plant lot numbers,—you gave the directions of the course of business to be established, did you not?

A. Yes.

Q. And whether or no that course of business was strictly followed, as you ordered, you have no personal knowledge, but you reached the conclusion that it was followed because you thought these were reliable people, that they would obey your orders? Is that the situation?

A. There were other reasons, one of which was that the result of their work checked sufficiently well with the returns we received from the concerns to whom we shipped the ore, to make it evident that the process of making up a shipment at Kennett was correctly carried out, or we could not have obtained as good a check as we did.

Q. You received no return on that group one that went to Bartlesville, did you?

A. As a whole we did.

Q. But not as to any individual carload?

A. No.

Q. Now, the course of business as you directed it to be pursued, if it were pursued, what would happen if it had been pursued, what would happen if Mr. Hubbard had given a plant lot number? Is it the fact, as you have already testified to, that he would write the number on pulp samples which would be transmitted, I presume, to the assay office?

A. Yes.

Q. And what else, according to the course of business, if it was [fol. 463] followed out as you directed to be, would be done by Mr. Hubbard in regard to the number of the plant lot?

A. He would tell the train conductor and the weighmaster what was the number of the plant lot.

Q. Would he put any sign on that plant lot?

A. I don't remember that instructions as to that were specific, and whether he actually put a sign on the plant or not, I don't know.

Q. Would he have any duty, if he fulfilled your directions, towards Mr. Kerwin in regard to that plant lot number?

A. Not directly, Mr. Kerwin might call on him for a report at any time as to just what he had done.

Q. But he had no positive duties prescribed by you in regard to plant lot numbers?

A. No.

Q. When the weighmaster came—when a lot came to him, as I understand it, the weighmaster would get the plant lot from Mr. Hubbard or Mr. Kerwin?

A. He would get from Mr. Kerwin the instructions as to what plant lots to include in a given shipment lot.

Q. And the quantity to take from that plant?

A. And the quantity to take from that plant lot.

Q. He would be able to tell the numbers of the plant lots that he was to draw from?

A. Yes.

Q. That would be the regular course?

A. Yes.

Q. Would Mr. Hubbard, according to the course of business you had prescribed, be resorted to by the weighmaster for any reason at that stage?

A. No.

Q. So that you have this situation,—that the weighmaster's information was not derived from any sign on the plant lot, but he was told as to the plant lot number and the quantity to be taken from it by Mr. Kerwin, who in turn was told by Mr. Hubbard, or [fol. 464] told in the first instance by Mr. Hubbard,—is that what you found the regular course of business?

A. No. Mr. Kerwin would know from the records of the plant what was the tonnage, and the analyses of each plant lot, and from those records he would figure out how much of each plant lot he wanted to go in a given shipment, and he would give that information to the weighmaster.

Q. But how would the weighmaster have identified any particular ore lots. Mr. Kerwin worked from the records, did he not?

A. Yes.

Q. Mr. Kerwin, working from the record, would not know which lot was No. 8 and which lot was No. 10, or would know there was a lot 8 and a lot 10, each of different quantities and qualities, or the quantity and quality of each one?

A. I think Mr. Kerwin would also know the number of the car containing that particular plant lot.

Q. There would be cases where the weighmaster would make up a carload, or a shipment, from sample lots that were on the ground or in bins?

The Master: In sample lots?

Mr. Jerome: Plant lots.

A. Yes.

Q. When the weighmaster would make up a car for shipment from plant lots, on the ground, he would, in the first instance, if your orders were obeyed, get directions from Mr. Kerwin to take so much ore from plant lot No. 8, we will say, so much ore from plant lot No. 10, and so much ore from plant lot No. 12, for that shipment lot, would he not?

[fol. 465] A. Well, I don't think any plant lots were ever put on the ground, except when they were put in certain definite stock piles.

Q. Take the case, then—

A. (Interrupting.) I think I can, if I can go ahead, I can explain it perhaps easier than by asking questions of me.

Q. Go ahead.

A. Each plant lot as it first came from a certain plant would be weighed by the weighmaster, and he would know what car that particular plant lot was in.

The Master: What particular company car, you mean?

The Witness: Company car.

A. (Continuing:) Consequently when he had orders to load out a shipment, and take a definite amount from each particular plant lot—certain particular plant lots—he would know by reference to his own memorandum just what cars those particular plant lots, were in, and Mr. Kerwin may also have had that information. I don't know positively whether he did or not.

Q. You had stock piles there, did you not?

A. Yes, sir.

Q. After the ore came down from the mines, a considerable portion of it went in the stock piles for shipment out from Kennett, did it not?

A. Not, except during that one particular period.

Q. Which period?

A. The period represented by the ore in Exhibit 21.

Q. That was what ore?

A. That was ore that was placed in stock at Kennett in bins C and D subsequently shipped out.

Q. In Bins C and D, did you say?

A. Yes.

Q. For how long a period was ore placed in Bins C and D?

[fol. 466] A. I think a little over three months.

Q. And when the weighmaster was about to make shipments from Bins C and D, he would first get his information as to plant number from Mr. Kerwin. Is that right?

A. He was not interested in plant lots on shipments from those bins.

Q. So that in shipments from Bins C and D plant numbers have no significance here?

A. Not in actual shipments.

Q. Had they any in analyses?

A. In calculating the shipments that would have been made to Beer-Sondheimer, if they had not refused the ore, the plant lot numbers and weights and analyses were all used.

Q. But when it came to shipping?

A. When it came to shipping, when it came to actual shipments to the United States Smelting Company, no reference was made to the plant lots numbers.

Q. Am I correct in this? That so far as plant numbers are concerned, for the purposes of determining shipments, these plant numbers of lots in bins C and D, have no significance?

A. No.

Q. On the question of shipment?

A. Yes.

Q. After you stopped putting ore in these bins C and D, did you then ever put ore in stock piles before shipment out from Kennett?

A. I am quite sure that none of the ore concerned in this suit was placed in stock after that period before shipment.

Q. During the period that you placed in bins C and D, did you place any ore subsequently sent to be smelted in stock piles?

A. I think that probably we put some ore, I think certainly, we put some ore in stock piles, and that some of that was subsequently [fol. 467] concentrated, and the concentrates shipped to the United States Smelting Company afterwards, after this period, after the period covered by the ore for which we are claiming payment from Beer-Sondheimer.

Q. After the period you began to ship to the United States Smelting?

A. No, after March 1, 1916.

Q. The amount of ore that was not placed in bins C and D, but placed in stock piles, you just testified to—have plant numbers any significance in regard to that, so far as shipments are concerned?

A. Not so far as shipments are concerned; only in calculating the general analyses of those particular stock piles.

Q. So far as the weighmaster's plant—where these plant numbers are concerned, they only have any application on shipments to ores that you shipped directly in cars without having first been put in Bins C and D, or in a stock pile?

A. Yes.

Q. If we begin at the period—

The Master: Is there any difference between Bins C and D and stock piles?

The Witness: The stock piles I have referred to contained ore that we have not made any claim against Beer-Sondheimer at all; does not enter into this suit.

The Master: You had a stock pile at Bartlesville, where ore was sent and refused and piled up—and you called that a stock pile. Then you had a period during which you were not sending ore either to Bartlesville or Altoona directly, as produced?

The Witness: Yes.

[fol. 468] The Master: And you made stock piles of that ore in bins C and D?

The Witness: Yes. We used bins C and D specifically to hold the ore that we thought Beer-Sondheimer should have received, and ore that we did not consider they should have received we placed elsewhere.

The Master: You mean by that, ore you did not think came within the contract requirements, is that it?

The Witness: Yes, that was it. I think I know what you are going to ask me, Mr. Jerome. Go ahead and ask me.

Q. I understood you to say in reply to the questions of Master, that these stock piles, not at Bartlesville, but at Kennett—piles outside of bins C and D, were not ore that we are concerned with, because it was not sent under the Beer-Sondheimer contract?

A. I think I testified as to stock piles, made after a certain date, or contemporaneous with Bins C and D. There were some stock piles made at an earlier date.

Q. For instance, I find on Plaintiff's Exhibit 18-B, under date of March, two shipments, one of which is indicated with the letters "Sp." "3" and the other "Sp." "51"?

A. Yes.

Q. Those refer to different stock piles?

A. Yes, they do.

Q. And those were shipped, were they?

A. Yes, those were shipped.

Q. And were drawn from stock piles?

A. Yes.

Q. And that was a part of the Beer-Sondheimer ore, was it not?

A. Yes. I would like to explain that, that these stock piles of ore, was put in these stock piles earlier than the putting of any ore [fol. 469] in bins C and D, I think about January, 1915.

Q. And did the weighmaster have any concern with the plant numbers—plant lot numbers on those two shipments?

A. No, he had no concern.

Q. When, from this record, does it appear those two shipments were made?

A. The date appears March 15, 1915. (Referring to Plaintiff's Exhibit 18-b.) But without referring to other records, I would not want to say positively that that was the date of shipment. I think it was.

Q. And your recollection is that that ore was produced in January, 1915, or December?

A. Somewhere near that date.

Q. It appears that those two lots went to Bartlesville, does it not, from the weighmaster's sheet, Exhibit 17-D?

A. It appears that shipment lot 38, in which was included certain tonnage from stock pile 3 and a certain tonnage from stock pile 51, was shipped to Bartlesville on March 15th.

Q. In the hypothetical sheets, as I have drawn them, of damages, what Beer-Sondheimer would have to pay, these two shipments from stock pile 3 and stock pile 51 are charged against them to the value of the metallic contents as of the date of shipment, are they not?

A. Yes.

Q. And yet they were produced in December, 1914, or January, 1915?

A. Yes, or possibly February.

Q. Do you recall now which of those three months—you cannot say?

A. No, not without referring to other sheets in evidence here.

Q. Can you do that?

A. (Referring to Exhibit 102.) It was because the analyses of that particular stock pile No. 3 was too low in zinc for shipment to Beer-[fol. 470] Sondheimer, but by mixing it with a higher grade of material subsequently produced we obtained an ore high enough in zinc to apply on the contract.

Q. Was that equally true of the products which appear on Exhibit 33 as being sent to Bin C in March?

A. No, that was not true. Those productions were all high enough in zinc to apply on the contract.

Q. And why were they not shipped to Beer-Sondheimer?

A. Because Beer-Sondheimer refused to accept this.

Q. Had they at that time?

A. Yes.

Q. But you continued to make shipments up to April, did you not, to Bartlesville?

A. I believe we did.

Q. Referring you to Plaintiff's Exhibit 18-c, you shipped at least one shipment of ore to Bartlesville from Bin C, as late as the 9th day of April, did you not?

A. Yes, we apparently did.

Q. On your hypothetical settlement sheets, with Beer-Sondheimer & Co., of what date did you take the metallic value of the contents, which you sent to Bin C as shown by Exhibit 33, in the month of March?

A. I would like to make a little explanation, referring to my answer to one of your recent questions.

Q. Suppose you answer this one first?

A. Of the date provided in the contract.

Q. What date, will you tell me?

A. Let me see Exhibit 16 (paper handed to witness). I will also want to see the contract (contract handed to witness). We use the price quoted in the Engineering and Mining Journal for the [fol. 471] week including March 12, 1915, in making the hypothetical settlement for Lot No. 35 in Exhibit 16.

Q. Which lot?

A. 35.

Q. Will you look at lot shipped No. 59. That lot that you shipped was made up in part of 49.6 tons of ore drawn from Bin C, was it not?

A. Yes.

Q. Is there any way you can tell when that 49.6 tons was put in Bin C?

A. Not that particular tonnage.

Q. There is no way of telling when that ore was mined?

A. No.

Q. And there is no way of telling when any of this ore was mined that was shipped to Bartlesville from Bin C?

A. I want to change my answer to that. We can probably tell roughly when that went into Bin C.

Q. That is when these 49.6 tons?

A. That is, it was some time prior to April 9th, 1915.

Q. It must have been prior to the time it was shipped. What I am driving at is when it went in?

A. I am giving you the best answer I can.

Q. You can give me no better answer than that it was prior to the time shipped?

The Master: You have the time you began to establish Bin C to dump ore?

The Witness: Yes, we can get it a little closer that way.

The Master: You can get between what date it was done?

The Witness: It must have been between March 30 and April 1st.

The Master: It was between those last mentioned dates that the ore was put in Bin C?

[fol. 472] The Witness: Yes, there was no ore put in Bin C between March 30 and April 21st.

The Master: You said from the 1st, was that a mistake? Was any ore put in before March 30th?

The Witness: Not to the best of my recollection. Can I now make this explanation I wanted to make a while ago?

Q. Yes, go ahead.

A. In reference to my testimony as to Exhibit 33, being the first four lots of ore shown as put into Bin C, I said I thought that the reason that we did not ship that immediately to Beer, Sondheimer & Co., was because they had refused to accept the ore. And I recall that the facts were that they had begun to object to receiving the ore, and that we were endeavoring to get them to accept a certain maximum daily quantity, and I think there is no doubt that those lots were not shipped because to have shipped on the day produced would have increased the quantity above the quantity for which we were negotiating with Beer-Sondheimer, endeavoring to get them to agree to accept this definite quantity.

The Master: During the immediate period between their objections to receiving more, and their absolute rejection of any further deliveries?

The Witness: Yes.

Q. Now, referring to the period when you commenced to ship to Altoona and Iola, and you were not shipping from Bin C or D, all other shipments came down from the mine in cars and went out [fol. 473] in cars without an intermediate period in which they went into a stock pile or a bin?

A. The shipment of ore came from the mine in cars, but it included various material that was not shipped to Beer-Sondheimer.

Q. But the ore——

The Master: It went out of those cars, as I understand, the cars that brought it down from the mine to the plant, the ore went out of those cars into a separating plant——

Q. (Continuing:) After you began to ship to Iola and Altoona ore that you were charging up against the Beer Sondheimer contract, you did not place any of the ore coming from the mine going out under this contract, either in bins C or D or a stock pile?

A. To the best of my recollection, we did not.

Q. So that a carload of ore would come down from the mine to Kennett, and go on your sorting plant, and you would select the ores that you thought could, either alone or mixed with other ores go to Altoona or Iola and be applicable under the Beer-Sondheimer contract?

A. Yes.

Q. And right from the picking plant onto a car?

A. Passing through a bin first.

Q. Would that be Bin C and D or a stock pile?

A. No.

Q. An intermediate storage.

Q. Had it a plant number before it went into that bin?

A. No.

Q. So at the time Mr. Hubbard gave it first a plant number was [fol. 474] when that ore came off your sorting plant and went into a bin?

A. And went into a car.

The Master: A Company car?

The Witness: A Company car.

Q. When you were no longer shipping to Altoona or Iola from bins C or D, or stock piles, the first time that a batch of ore got a plant number was after the sample had been drawn from it, and it went on a company car. Is that correct?

A. The drawing of the sample and the going on of the company car were simultaneous. That was the time it got the plant lot number.

Q. And had a plant lot number applied to it on that batch of ore on that car?

A. Yes.

Q. That was a company car as distinguished from a railroad car?

A. It generally was, but we may sometimes have used a railroad car for that purpose.

Q. Did any car have more than one plant number?

A. Not at the same time.

Q. When it was on that car, was the time that Mr. Hubbard gave it the plant number?

A. Yes.

Q. And he took the pulp assay, and wrote that plant number on the pulp sample and transmitted it to the assay office?

A. Yes.

Q. Mr. Kerwin determined the quantity to be taken from any plant samples from your assay office control or record book, did he not?

A. Probably from the assay certificates that he received from the assay office giving that same information.

Q. And then he instructed the weighmaster as to the making up of the carload that was for shipment?

A. Yes.

[fol. 475] Q. There was then, if I understand you right, no custom established by you that required Mr. Hubbard to communicate to the weighmaster, or point out to him which particular car these plant lots corresponded to—the plant lot number?

A. He was supposed to tell the weighmaster what plant lot went into what car, when it was put into the car, or shortly thereafter.

He was not supposed to give him that information later when they were making up a shipment lot.

Q. That was your direction, was it?

A. Yes.

Q. That Mr. Hubbard, when a plant lot was made up on any particular car, was to inform the weighmaster what that plant lot was, if it happened to be No. 8, he was to inform the weighmaster that on that particular car that plant lot was No. 8?

A. Yes.

The Master: Was there any sign on that car to identify the ore, or anything with the plant lot number on it?

The Witness: I don't recollect whether there was or not. In the natural course of business, if there was any accumulation of such cars, there would be a mark, but if there was only one or two, say, so that there would be no danger of their getting mixed up, we would not have such a mark.

Q. That testimony is purely hypothetical, is it not?

A. As to the general way we did business.

Q. You don't recollect that it was ever done in a single case in regard to this zinc ore that went to Altoona or Iola?

A. No.

Q. You don't recollect giving any directions that that should be [fol. 476] done in regard to this ore?

A. I remember giving directions that they should be careful not to get mixed up.

Q. Did you give any directions that some sign was to be placed on the sample lot, indicating its number?

A. No.

The Master: On the car load?

Mr. Jerome: The plant lot.

Q. How many cars containing plant lots,—when I speak of plant lots, I am referring exclusively to zinc ores going to Altoona and Iola—would there usually be waiting for shipment out made up there?

A. I don't think there would ever be over three or four, there might, no, I don't believe there ever was more than three or four. That is of one sort of ore.

Q. By one sort of ore you refer to this zinc ore grade that you deemed was sufficient either alone or mixed with other grades to be shipped to Iola or Altoona?

A. By a mistake at one time we included some concentrates in shipments to Altoona, and if you count the concentrates lots and the coarse ore alone separately, they might be as many as six or seven lots, including both those two sorts of ore.

Q. The assay certificates are the basis, are they not, of the metallic assay and analysis certificates—are the basis of the figures showing metallic contents found in these various exhibits that have been introduced here where it purports to be analyses of ore produced at Kennett or shipped from Kennett?

A. I would not say that the assay certificates were exactly the basis.

[fol. 477] The assay certificates were the means by which the information shown on the assay records books was given to the accounting department.

Q. I don't mean that they were the ultimate basis, but I mean in the preparation of these different sheets of production and shipment, the percentages of metallic quantities or metallic contents, were derived,—the data was derived from,—the accounting department made these up from the certificates coming from the assay office, didn't it?

A. Or from the assay record books direct, as the case might be.

Q. And the assay record books are Plaintiff's Exhibits now in evidence, 19-a and 19-b, are they not?

A. They are.

Q. All these exhibits here outside of the daily analysis books, daily assay books, so far as they purport to show metallic contents of quantities or percentages, were derived in the metallurgical accounting department wholly from the certificates from the assay office or these assay records as to which you have just been speaking?

A. Either directly or by calculation, except where the Altoona or Iola assays were used in certain of these records.

Q. And these books Exhibits 19-a and 19-b were compiled in the assay department from the assay certificates—from the daily analytical and day books?

A. Yes.

Q. So that the ultimate basis of these figures appearing in these exhibits, in these various exhibits of product and shipments that have been introduced here, go back ultimately to the accuracy of the entries in the analytical and assay day books?

A. Yes, so far as the Kennett records are concerned.

[fol. 478] Q. So far as the Kennett records are concerned, the ultimate source of information shown in these exhibits are found in these analytical and assay day books, are they not, as to metal contents?

A. I don't know just——

Mr. Stockton: I object to the question as being too indefinite, what that means.

The Master: It seems clear enough. I think Mr. Metcalf can answer it. I think he has answered it.

The Witness: That is true so far as those records appearing in these books.

The Master: That is true so far as the records on these various sheets are made up from the Kennett assay?

The Witness: Not from the analytical and assay books, because there are certain of these analytical and assay day books that are missing, and for the assays which would have been in those missing, the ultimate source that we produce here is in these assay record books.

Q. But with the exception of the books, the analytical and assay day books, with the exception of those books which are missing——

The Master (interrupting): Are there books missing or sheets?

Mr. Jerome: Books.

The Witness: One book.

Q. The ultimate source of the information on the metallic contents [fol. 479] tents contained in the exhibits here, prepared at Kennett, being the Kennett records, are based upon these analytical and assay day books?

A. Yes.

Q. And in the case of the missing analytical and assay day books, they are based upon entires made in the assay records, Exhibits 19-a and 19-b?

A. Yes.

Q. Which in turn, so far as they relate to entries not in the produced analytical and assay day books, are based upon the missing—are supposed to be copies, copied from the analytical and assay day books?

A. Yes.

Q. Is there included in these figures one shipment which ought to be excluded because of its containing a zinc content too low?

A. I rather—our attorneys say we did, I should put it that way.

Q. Can we point to it so that a note may be made that it is to be deducted?

A. I point to the sheets headed "Mammoth zinc ore shipped to U. S. Smelting Company, M. C. M. Co. Lot No. 42" in Exhibit 16, date of March 17, 1915.

Mr. Jerome: The witness refers to paper forming one of the hypothetical sheets with Beer, Sondheimer & Company, forming part of Plaintiff's Exhibit 16, namely, that sheet which indicates the date of the bill of lading as March 17, 1915, and the net value of the shipment as \$755.10.

Q. What was the discrepancy between the average assays of the Bartlesville ore, that is to say that was dumped at Bartlesville, as shown by the assays at Kennett, and the assays made at Kansas City?

A. Do you mean gold, silver, copper or zinc?

[fol. 480] Q. Zinc contents?

A. I stated yesterday that the Kennett assay for zinc was 38.2 per cent., and the Altoona sample assaying for zinc was 37.1 per cent. I have since checked this up and find the correct figure for the Kennett assay for zinc should be 38.3 per cent. instead of 38.2.

Cross-examination my Mr. Jerome:

* * * * *

Q. These two companies, the Mammoth and the U. S. Smelting Co., were subsidiary companies, were they not?

A. Yes.

Q. And by their relations all business in matters of charge accounts, debits and credits were ultimately cleared through the parent company in Boston; the transactions were nominally in dollars and cents between them, but really cleared in Boston in the books of the parent company?

A. Yes, sir.

Q. And that in March of that year it started at about 8 cents a pound?

A. Yes.

Q. And observing the figures in this exhibit, you find that there was a steady progression in values, roughly speaking, I don't mean steadily, but a constant upward trend from eight cents up to over 21 1/3 cents a pound in June of that year?

A. There was a general rise. I am not sure it was invariably a rise. I think some weeks—

The Master (interrupting): With certain recessions, perhaps?

The Witness: Yes.

Q. And in the month of June, in the second week of June, it got as high as 25 cents a pound, did it not?

A. Yes.

Q. Under this contract which you made, which was made between the Mammoth Mining Company and U. S. Smelting Company after the repudiation by Beer Sondheimer of their contract, you got no profit at all, did you, from variations in the price of spelter above 11 cents a pound?

A. No, we did not.

Q. So that any profit above 11 cents a pound any variation of price, that took spelter above 11 cents a pound, the profit was reaped by the U. S. Smelting Company,—the profit due to the increase in price?

A. Providing they made a profit.

Q. So far as zinc content went, they got the increase of every rise above 11 cents?

A. If they were able to sell at that price.

[fol. 485] Q. Those were the ruling prices as shown by the Engineering and Mining Journal, were they not?

A. Yes.

Q. For purposes of illustration, under that contract with the U. S. Smelting Company, if when Mammoth shipped to the U. S. Smelting Company a carload of this ore the ruling price was 20 cents, they got no benefit, they received the same payment as if it was 11 cents?

A. Exactly.

Q. At any time that the U. S. Smelting Company wanted on five days' notice, they could cancel this contract with Mammoth, could they not?

A. The contract states that it may be cancelled upon five days' written notice by either party.

Q. Were there any smelters at that time in the United States smelting zinc, smelting on a toll basis?

A. I don't know of my own knowledge, but I think there were.

Q. Don't you know as a matter of fact, or is it not the fact, that either Altoona or Iola smelted zinc ores,—crude zinc ores—on a toll basis at or about the time that you were shipping ores to Altoona or Iola under this contract with the United States Smelting Company?

A. I don't know positively whether that is true or not, but think it is not true.

"It is conceded on the record that times during the period that the contract between the Mammoth Copper Company and U. S. Smelting Company in regard to these zinc ores covered by the Beer Sounheimer contract was in operation, the United States Smelting Company at Altoona or Iola was smelting zinc ore on a toll basis."

[fol. 486] Q. When an ore is smelted on a toll basis after a contract is made with the smelters to smelt that ore, the variations in the value of the metallic content, not in its quantity, does not affect the toll agreement?

A. It would depend upon the particular toll agreement; ordinarily, I would say it would not.

Q. So that ordinarily a person making a toll agreement with a smelter, if the value of the metallic content in ores smelted increased the person sending the ores to be smelted would obtain the value of that increase?

A. I don't believe, I am not sufficiently familiar with toll contracts to testify whether that is ordinarily the case or not. I think it would depend on the particular contract.

The Master: Would you say that such a case is conceivable?

The Witness: Such a case is conceivable.

Q. Before you entered into this contract between the Mammoth Copper Mining Company and the U. S. Smelting Company, this contract, copy of which has been produced here, did you make no inquiries as to whether or no it was possible to have these ores in question smelted under a toll contract?

A. I endeavored through different agents to find someone that would smelt them under any sort of contracts, but in vain.

Q. Did you apply to the U. S. Smelting Company and inquire of them if they would smelt them under a toll contract?

A. I did not.

Q. So the question of whether the U. S. Smelting Company would smelt under a toll contract or not was not at any time discussed, so [fol. 487] far as you know, as between the Smelting Company and the Mammoth Company?

A. So far as I know, it was not.

Q. Who negotiated this contract between the Mammoth Copper Company and the Smelting Company?

A. The manager of the U. S. Smelting Company, the zinc department, and myself.

Q. And who was that manager?

A. Mr. W. H. Eardley.

Q. The gentleman who sits here?

A. Yes. I might add to that that the terms to be applied to the Kennett ore, which I guess is part of the negotiations of the contract, were discussed by other officials of the Mammoth Company and by officials of the parent company, and the decision reached

was that a contract should be negotiated on the same terms at which the U. S. Smelting Company could buy similar zinc ores from other mines, and when Mr. Eardley wrote to me a letter embodying what he stated to be those terms, I proceeded to ship under those terms.

Q. I understood you to say this, that the result of your inquiries was that there was no market for zinc ores such as these at any price. Did I understand you correctly?

A. There was not at the time when we were making inquiries and until the United States Smelting Company acquired zinc smelters and made us an offer for these ores.

Q. And this contract between the Mammoth and the U. S. Smelting Company, before it became a binding contract between the two subsidiaries, was submitted to and approved by the proper officers of the parent company, the United States Smelting, Mining & Refining Company?

A. I think not. I think that the instructions given to Mr. [fol. 488] Eardley by the parent company were to give the Mammoth the same terms at which he could buy zinc ores from other mines, but that those special terms were not specified.

Q. In other words, while the actual figures, terms, were not specified this contract between the Mammoth and the U. S. Smelters was entered into by direction of the parent company?

A. I am not sure whether that is true. It was entered into with the knowledge and consent of the officials of the parent company, and the general principle was outlined by the officials of the parent company who was also an official of the Mammoth.

Q. When this contract between the Mammoth and the U. S. Smelting Company was presented to you, did you have any voice in determining the terms of it, you as representing the Mammoth Company?

A. I had the option of either accepting it or rejecting it, but if I had rejected it the higher officials of the company would have thought it was inexcusable on my part unless I was able to find an equally good market elsewhere.

Q. But the terms as embodied in this were presented to you as they were in the finally executed contract?

A. The terms as originally presented to me were accepted and we proceeded to ship. There was no formally executed contract more than the original of this letter and our action under it.

Q. In other words, upon Eardley writing you this letter, which we call the contract, but which is in the form of a letter, and after Eardley had written you that letter you proceeded to act under it as if it had been a formally accepted contract?

A. Yes, sir.

[fol. 489] Q. Who were the lawyers of the parent company and the subsidiary company in San Francisco?

Mr. Stockton: Objected to as immaterial.

Overruled. Exception.

A. Alfred Sutro was the attorney for both the parent company and Mammoth Copper Mining Company.

Q. When the repudiation came from Beer, Sondheimer & Company, did you learn of it at once?

A. Yes.

Q. And did you thereafter confer with Mr. Sutro?

A. Yes.

Q. And thereafter in all matters concerning the way that the Mammoth Copper Company acted in regard to these various ores, shipments, et cetera, you acted in accordance with the directions of Mr. Sutro?

Mr. Stockton: I object to the question as immaterial; not proper cross-examination.

Overruled. Exception.

A. Generally, Mr. Sutro and I consulted and decided on a course of action.

Q. And that consultation involved a discussion, did it not, of what evidence it would be necessary to have in a litigation subsequently to be brought by the Mammoth Copper Mining Company, or its assignees, against Beer, Sondheimer & Company?

A. It did, in a general way.

Q. At that time you knew that it was the custom at Kennett to prepare assay certificates, did you not?

A. Yes.

[fol. 490] Q. And did you communicate that fact to Mr. Sutro?

A. I don't recall whether I did or not.

Q. Did you discuss very fully with Mr. Sutro or some representative of his office the questions of evidence that would be necessary as to showing shipments, metallic contents, weights, and that sort of thing?

Mr. Stockton: Objected to on the ground of immateriality.

Overruled. Exception.

A. I did, in a general way, but not in as great particularity as I now wish I had.

Q. Did Mr. Sutro, or some representative of his office, outline to you the character, in a general way, we will say, of records that might be necessary?

A. Yes.

Q. Is it not true that careful inquiry was made by Mr. Sutro or his representatives of just what records you were keeping in regard to this ore that would come under the Beer, Sondheimer contract?

A. I don't recall how thorough an inquiry was made. I know that he asked about certain records, and I could not state as to just what particular records he did ask about.

Q. These assay office reports were always signed by a particular chemist, by someone in the assay or chemical department?

A. They were always signed by the chief chemist, or in his absence by his assistant who was at the time in charge of the assay office.

Q. And after you were aware of the fact that litigation was liable

to arise between the Mammoth Copper Company, or its assignee, and [fol. 491] Beer, Sondheimer & Company, and after you had consulted with the attorneys of the Mammoth Copper Company, at least in a general way, as to evidence that would be needful in that suit, you took no steps to prevent the destruction of the assay analysis reports which were placed on file in the regular course of business and kept for some time?

A. No, I took no steps to preserve them any longer than we had been in the habit of preserving them.

Q. And you don't now know whether they were destroyed or not?

A. Not of my personal knowledge.

Q. Did you make any search for them personally?

A. Yes.

Q. How recently?

A. About,—the latter part of 1919. I might say that I did not specifically search for the laboratory reports. I searched in a general way for any date that might be useful in the course of this litigation.

Q. That you esteemed useful?

A. That I thought would be useful, and I looked in the room where we had kept these laboratory reports when we were using them.

Q. Had any papers in connection with this—any records in connection with this litigation or dispute been previously transmitted to Mr. Sutro or to anyone else from Kennett?

A. Yes, certain papers had.

Q. Do you know whether any of these assay certificates had been transmitted?

A. None of them had.

Q. You know that none had?

A. I know that none had.

Q. You know this analysis day book, No. 3—assay book—you know this assay day book No. 3?

A. Yes.

[fol. 492] Q. Do you know what this inscription in the back of it "Keep out this book, it is dangerous weapon" refers to?

A. I do not.

Q. Do you know in whose handwriting it is?

A. No, I don't.

Q. Do you know of any reason why this book should, in any way, shape or manner militate against the claim of the assignee of the Mammoth Copper Company in this litigation?

A. No, I don't.

Q. Did you discuss Mr. Kindleberger with Mr. Sutro?

A. I think that while we were taking the depositions in San Francisco, and the fact developed that Mr. Kindleberger had made certain assays, that I did discuss Mr. Kindleberger with Mr. Sutro.

Q. How long was Mr. Kindleberger in your employ at the mines?

A. Probably eight years; something like that.

Q. During the month of August, 1915, was there approximately 5,000 tons of low-grade ore, zinc ore, tendered to Beer, Sondheimer & Co.?

A. I could not say without seeing the letter that I wrote Beer, Sondheimer & Co. at approximately that time.

Q. I show you now that letter which was dated August 5, 1915, and signed by you, letter to Beer, Sondheimer & Co. signed Mammoth Copper Mining Company of Maine, per G. W. Metcalf, Manager.

The Master: You show it to him to refresh his recollection.

A. Yes, we tendered Beer, Sondheimer & Co. approximately 5,000 tons on August 5, 1915.

Q. In which the zinc crude ore was running less than 33 per cent.?

A. Yes.

[fol. 493] Q. In this claim for damages now before the Master, is that 5,000, or approximately 5,000 tons, roughly, in this letter included?

A. No, that is not included.

Q. No part of it?

A. No part of this.

Q. No part of that was taken and sweetened with other ores?

A. I want to modify that statement a little. In the claim as originally prepared we included by mistake certain concentrates, and it is barely possible that some of that 5,000 of low-grade zinc ore was included in the ore that was concentrated to make these concentrates. But as I think has already appeared, we are not claiming payment on account of any such concentrates.

Q. The approximately 5,000 tons of ore referred to in this letter, neither the whole nor any part of it is in any way made a basis of your claim for damages here because Beer, Sondheimer & Co. did not accept it?

A. No, it is not included in our final claim after deducting these concentrates, and I am not sure that any of it would be included even if we left the concentrates in.

Q. Will you refresh your memory by reading this portion of the letter:

"We have on hand approximately 5,000 tons zinc product running less than 33 per cent. zinc. We hereby offer to sell you the same under the terms of our contract with you dated August 26th, 1914. Kindly advise us promptly if you elect to accept this product, because if you do not elect to accept same we will dispose of it elsewhere."

[fol. 494] Did you dispose of it elsewhere?

A. We apparently did, all that was disposable of it. There may have been some part of it that we used ourselves.

Q. Is there any part of that approximately 5,000 tons referred to in this letter that enters into the computations and calculations and entries shown in these various exhibits in evidence before the Master?

A. I will repeat my answer awhile ago.

The Master: You said you had struck all the concentrates out of your claim now. If you are merely going to say it may include any concentrates and concentrates do not enter into the claim now, you can answer this question one way or the other.

The Witness: As already explained, it may possibly appear in some of those exhibits, computations in the shape of concentrates which may be described either as jig product or as middlings, but it is taken off of our final claim.

The Master: It may appear in some place in some of these exhibits?

The Witness: Yes.

The Master: But it does not enter into your claim as finally presented?

The Witness: Exactly.

Q. Taking Exhibits 21, 23 and 16, is it correct that in no portion of any one of those exhibits is there any entry either in whole or in part that in any way refers or relates to these approximately 5,000 tons referred to in that letter; or any part thereof?

A. Certain of the lots named in some of these exhibits contain a certain amount of jig products and middlings, which I have called [fol. 495] concentrates, and it is barely possible that some of these concentrates were partly made from some of this 5,000 tons, but said concentrates do not make a part of our final claim.

Q. On Exhibit 21, the first two pages are tabulations, are they not?

A. They are.

Q. Showing what the amount of your claim is. If you take Exhibits 21, 23 and 16 together, the tabulations, the first of each of these exhibits show what the claim against Beer-Sondheimer is?

A. They show what the claim against Beer-Sondheimer was considered to be at the time they were prepared. They have since been corrected.

The Master: Do you mean have been corrected by any matter of record in this case, or do you mean that you intend to make certain deductions on account of these inferior ores that were included among the concentrates before your case is closed?

The Witness: I don't think the corrections have been made in the shape of legal evidence. I believe that in the hearing before the Judge I put in a statement as to the amount of our claim in which those deductions were made as to concentrates, but not supported by the detailed calculations showing just why.

The Master: No entry has been made on the exhibits to which Mr. Jerome refers making these deductions?

The Witness: No.

Q. Or nothing filed here before the Master at this time showing those deductions?

A. No.

[fol. 496] Q. Now, at the time that these ores were being shipped from Kennett, there was a certain basic freight rate, was there not?

A. Yes.

Q. And that basic freight rate was the minimum freight for a given weight, was it not, irrespective of the value placed upon the ore shipped?

A. I am not sure that that phraseology is exactly right.

Q. Let me put it this way: There was a scale of tariffs established at that time for freight rates which varied with the value of the ore shipped?

A. There was.

Q. And the value of the ore shipped was determined in fixing that rate—

A. (Interrupting.) Yes.

Q. (Continuing:) by the contract price of the ores shipped?

Mr. Stockton: Objected to as not proper cross examination, there was nothing on the direct examination connected with that. More than that, it requires a legal conclusion. It is not even a conclusion of fact for the witness to make. What he is asking for the witness to state—

The Master (interrupting): I think he is asking him this question: If, in the adjustment of these freights, the value of ore shipped under the contract was determined by the contract price. That is what you are asking him?

Mr. Jerome: Precisely so.

Objection overruled. Exception.

A. It was determined by the contract terms in connection with the prices of the metals.

[fol. 497] Mr. Stockton: I object also on the ground it is not the best evidence; the tariffs will speak for themselves.

The Master: They will have to be proved.

Q. Then if ore was being shipped out from Kennett, the Mammoth Company being the vendor of that ore, and the ore in the contract of sale came to \$30 a ton on the assay, and in another group of the same kind of ore shipped out, the metal contents of which brought it up under the terms of the contract to \$60 a ton, a higher rate of freight would be charged on the ore at \$60 in the contract than on the \$30 contained in the contract, although the destination was the same in each case?

A. In a general way, that would probably be true, depending upon the particular tariff to the particular place.

Q. The tariffs at that time, the time covered by these transactions to Bartlesville and to Altoona—the freight tariff was the same for the same quantity of zinc ore of the same value, was it not?

A. Yes.

Q. The terms of the agreement between the Mammoth Company and U. S. Smelting Company as contrasted with the terms of the contract between the Mammoth Company and Beer-Sondheimer were such that the contract value to be paid by the U. S. Smelting Com-

pany to the Mammoth Company was lower per ton, metallic contents being the same, than Beer-Sondheimer was under obligation to pay?

A. Yes.

— Therefore the freights at that time to Bartlesville that you paid on shipments to Beer, Sondheimer & Company were greater than [fol. 498] the freights that had to be paid for like quantity and quality of ore to Altoona or Iola?

Mr. Stockton: Objected to as not proper cross examination, and calling for a legal conclusion.

Overruled. Exception.

The Master: You mean, would have been greater?

Mr. Jerome: I will put it would have been greater.

A. And it may also mean shipped at the same time.

The Master: If there was a change of rates, Mr. Metcalf, between the date of the repudiation of this contract with Beer, Sondheimer & Company and the date of your shipment to the United States Smelting Company, of course, you may point that out.

A. The question of value of the ore depends as much on the date when it should be settled for under the contract in question as on any other.

Q. We are assuming the ore and quantity of it were fixed, we are assuming it is the same quantity of ore with the same metallic contents under the Beer-Sondheimer contract. You would have had to pay a greater freight to Bartlesville than you would have for the same quantity of ore with the same metallic content to Altoona under the contract between Mammoth and the U. S. Smelter?

The Master: We are assuming all other conditions remaining the same.

[fol. 499] The Witness: I am unable to answer that question unless I have information to enable me to tell whether the value of that ore would be greater if settled for under the Beer-Sondheimer contract than if settled for under the U. S. Smelting Company contract.

Q. Let me put it this way to you. As a matter of fact, there were certain carloads of crude zinc ore that had this contract not been repudiated would have been shipped to Beer-Sondheimer, were there not?

A. Yes.

Q. And such carloads of crude zinc ore, because of the repudiation, you shipped to Altoona or Iola, did you not?

A. Yes.

Q. The contract price which Beer, Sondheimer & Co. would have paid you for these carload lots at the time you shipped them to Iola or Altoona had they gone to Beer-Sondheimer, would have been a larger sum of money than Altoona or Iola paid you for them at the same time?

A. Yes.

The Master: Are you able to say that they would have been without knowledge of the fluctuating elements in the determination of the value under the Beer-Sondheimer contract?

The Witness: Yes, in a general way, all payments claimed from Beer-Sondheimer are greater than that actually paid.

Q. From Iola or Altoona?

A. Yes.

Q. When you shipped a particular car to Altoona, which you would have shipped to Beer-Sondheimer had the contract not been [fol. 500] repudiated, there was a certain freight charge to Altoona, was there not?

A. There was.

Q. But inasmuch as the contract price that you would have received from Beer-Sondheimer had that been sent to Beer-Sondheimer and accepted at Bartlesville, was higher than your contract price with Altoona had you shipped that specific car to Beer-Sondheimer & Co. at Bartlesville, you would have been compelled to pay a higher rate on it than you did pay on it in shipping it to Altoona?

Mr. Stockton: Objected to.

Overruled. Exception.

A. We would.

Q. And the calculation of those differences in freights on these actual ores in question that were shipped to Altoona or Iola because of Beer-Sondheimer's repudiation—the actual difference of those freight rates has been calculated, has it not?

A. Yes, I believe it has.

Q. And it amounts in the vicinity, roughly, of \$30,000?

A. Something like that, I believe.

Q. On the ore that you actually sent to Bartlesville had Beer-Sondheimer lived up to their contract—you claim they did not—they would have paid the freight on receipt of the ore and charged it against you on the purchase price, would they not?

A. Yes.

Q. And up to the time of repudiation, that is what they did do?

A. Yes.

Q. When they repudiated and you continued to send ore to Bartlesville, it was dumped there and subsequently transferred elsewhere, you paid the freight, did you not?

[fol. 501] A. Not directly, that is, it was paid, I think, by the U. S. Smelting Company for our account.

Q. Whoever actually advanced it, it was charged against you?

A. Yes.

Q. And that freight that was charged against you if you did not pay it directly was on the basis of the freight rate fixed by the price of ore specified in the contract between the Mammoth Company and Beer-Sondheimer & Company?

Mr. Stockton: Objected to on the ground that it is immaterial and not proper cross examination.

Overruled. Exception.

A. I don't know what basis that freight was paid on.

Q. Have you any exhibit or memorandum here that would enable you to state?

A. No, on these exhibits or memoranda it appears as a lump sum, or as a combination of two or three lump sums, being the actual amount that the U. S. Smelting Company had to pay the Railroad Company to get that ore from Bartlesville.

Q. So that that particular Bartlesville lot, that is lumped in with other freight?

A. No.

Q. It would include the trip to Bartlesville and from Bartlesville to Altoona, would it not?

A. No, the freight from Bartlesville to Altoona's shown in items affecting each individual lot on these exhibits. But freight from Kennett to Bartlesville is shown as one lump sum payment of approximately \$17,000 with two or three subsequent payments, making corrections of perhaps \$900 more, something like that.

[fol. 502] Q. But those amounts are on the basis of the price of ore fixed by the Beer-Sondheimer contract?

A. I don't know what basis they are on. No statement was ever rendered to me giving the way that freight was calculated. I only know that that was the amount that had to be paid by the U. S. Smelting Company before they could get that ore picked up from Bartlesville and ship it to Altoona, and then they had to pay additional freight for our account covering the haul from Bartlesville to Altoona.

Q. But was not that amount, I am speaking of the amount that they had to pay on freight to the company before they would release the ore that had been dumped—was not that amount, the amount that would have been charged against you for freight from Kennett to Bartlesville had it been accepted by Beer, Sondheimer & Co.?

Mr. Stockton: I object to the question.

The witness has already testified that he does not know.

Overruled. Exception.

A. I don't know, and the reason I don't know is that as Beer, Sondheimer & Company did not receive a sample and analyze that ore, I don't know just what basis would have been applied if they had received it, as they should have done, and I don't know whether the actual payment was based on our Kennett assays and weights figured on the terms of the Beer-Sondheimer contract, or whether it was figured on an average basis like former shipments of ore would have taken, or on any average basis such as subsequent shipments would have taken.

[fol. 503] Q. But had it been accepted by Beer, Sondheimer & Company, this ore dumped at Bartlesville, the ultimate freight that would have been charged against you under your contract with Beer-Sondheimer would have been determined under the tariffs in force at that time by the value of that ore as determined by your settlement sheets between yourself and Beer-Sondheimer?

Mr. Stockton: Objected to as hypothetical.
Overruled. Exception.

A. Yes.

The Master: That is to say it would have been determined by the terms of the contract between you and Beer, Sondheimer & Company?

The Witness: Sure.

Adjourned to October 1st, 1920, at 10:30 A. M.

Q. In the computations presented here to the Master as showing the damage incurred by the alleged breach of contract on the part of Beer, Sondheimer & Company, there is an item of interest, is there not?

A. I think not in the computations.

Mr. Jerome: That is claimed isn't it, Mr. Stockton?

Mr. Stockton: Yes.

Q. It has been calculated from what dates?

Mr. Stockton: From the particular dates when the shipments—
[fol. 504] Mr. Jerome (Interrupting): From the repudiation on.

Redirect examination by Mr. Stockton:

Q. You were asked on cross examination whether you had consulted with Mr. Sutro subsequent to the breach of this contract by Beer, Sondheimer & Company with reference to the records to be preserved in order to prove your damages from that breach. Do you remember whether you and Mr. Sutro went into any detailed discussion as to the particular records that you would have to preserve?

A. We did not go into it in any very great detail. I remember that he asked me to be sure that we preserved the weighmasters' reports, and the assay record books, and the bills of lading, at Kennett, and I don't remember what, if any, other possible records we discussed.

Q. Do you remember whether he told you anything at all with reference to the daily assay sheets?

A. I have no recollection of his having said anything about that, but if he asked for them to be preserved we would, of course, have preserved them, so I know he did not ask them to be preserved.

Q. Do you remember—

Mr. Jerome (interrupting): I move that the latter part of that answer be stricken out. It is a mere matter of inference.

(Question read.)

The Master: Strike out everything after the sentence "I have no recollection of his having said anything about them."

[fol. 505] Q. In fact, did you suppose up to November, 1919, that it would be necessary for you to produce any other records besides the weighmasters' reports and the assay record books?

Mr. Jerome: I object to that as incompetent and wholly immaterial.

Overruled; exception.

Q. And the bills of lading—copies of the bills of lading, that is all I thought we would have to produce.

Q. Will you state whether or not you directed any change to be made in the matter of preserving the identity of the plant lots, and the shipment lots at Kennett after Beer, Sondheimer & Company repudiated their contract?

A. No, I made no such change.

Q. Do you know of any such change being made?

A. No.

Q. So far as you know was the same general custom followed after the breach of contract in identifying the plant lots and shipment lots and connecting them up that was followed prior to that time?

A. It was.

Q. Mr. Metcalf, when a chemist sets down the result of his assay or analysis of an ore in figures representing so many thousandths of an ounce of gold, or a certain percentage of zinc, will you state whether or not those figures represent the actual amount of gold found in the sample which the chemist was analyzing or assaying?

Mr. Jerome: Objected to as incompetent.

The Master: I don't know as Mr. Metcalf has been qualified as a chemist, but he may have derived from experience knowledge of the [fol. 506] way in which laboratory reports on such subjects are interpreted—what meaning they convey.

Mr. Jerome: These exhibits here do not purport to show the actual amount, for instance, of gold or silver found in the sample.

Mr. Stockton: I am asking a general question.

The Master: He has not directed this question to any particular exhibit. Read the question.

Question read.

Mr. Jerome: Objection withdrawn.

A. Those figures ordinarily represent simply the proportion of the particular metal in the sample, and consequently in the ore that that sample represents.

Q. Therefore, when a chemist states, for instance, that—when a chemist states the result of his assay in terms of .112 of an ounce of gold that indicates, that is a statement, that he has found in the sample which he was assaying gold at the rate of .112 of an ounce to the ton, is that correct?

A. That is correct.

Q. It does not represent that he has actually found that amount of gold in that sample?

A. It may sometimes represent that, but not necessarily.

Q. It would only represent that if he used a sample the size of a ton—

A. (Interrupting.) It would only represent that if he used a sample whose weight in relation to a gramme was the same as the relation of a ton to an ounce.

Q. Is that the regular practice of chemists indicating the results [fol. 507] of their assays and analyses?

A. Yes.

Q. Is the practice of recording the results of analyses and assays in terms indicating the proportion of the metal found in the sample the ordinary practice followed by all chemists?

A. That is the ordinary practice.

The Master: That is it determines the actual weight in the sample?

The Witness: No.

Q. I am asking whether—read the last question.

Last question read.

Q. (Continuing:) In the actual assay and analytical work done at Kennett, are you familiar with the practice that was generally followed in the laboratories?

A. Do you mean the details of making analyses or of reporting their work?

Q. The general practice of making analyses—I withdraw that question.

Q. Mr. Metcalf, when you testified that you did not know of your own knowledge what Mr. Hubbard and Mr. Barr and Mr. Buick did in the usual course of business, do you mean that you never saw them actually following out the rules which you laid down?

A. No, I did not mean that.

Q. Will you explain a little more fully what you did mean?

A. I meant that I did not always see them actually at their duties, and that I could not say as to any specific weighing or handling of any special kind of ore at any special time, that I saw them, but I often saw them carrying out their duties.

[fol. 508] Q. And whenever you were present while they were at work, they did their work in a manner which you had laid down?

A. They did.

Q. And were you frequently present, did you frequently go around the plant and keep in touch with the work?

A. Yes, I did.

Q. And observed how it was done?

A. Yes, I did.

Q. Will you state how far it was from the sorting plant to the scale house?

A. About one hundred and fifty yards.

Q. And how far was it from the—in what position did the sample mill stand relating to those two houses?

A. The sample mill was up on the side of the sorting plant away

from the scale house and probably two hundred yards from the sorting plant.

Q. Where were the tracks upon which the cars containing plant lots would be spotted if they were not unloaded into Bin C or D pending shipment?

A. There were several tracks where at times they were spotted. Right at the sorting plants there were two tracks, one the track into which the sorting plants Bins delivered—on which the cars stood when they were loaded from the sorting plant bins, and another immediately adjoining that and at times these cars were spotted there. Right at the scale house itself there were a number of tracks in addition to the track running over the scales and at times they were spotted there and we had quite extensive railroad yards, and they might have been spotted at times at a greater distance from either the scale house or the sorting plant.

Q. You were asked as to the reasons for delay in shipping zinc fines which were put into stock piles in February. Will you state whether or not those zinc fines were of a high enough grade to be [fol. 509] shipped without mixing them with any other ore?

A. They were not high enough to ship to Beer, Sondheimer.

Q. In order to entitle them to be shipped under the terms of the contract, what was it necessary to do?

A. It was necessary to so combine them with ore carrying a higher percentage of zinc so that the analysis of the entire carload shipment would be up to thirty-three per cent of zinc under the contract. At one time, I was advised that Beer, Sondheimer & Company would accept ore running somewhat lower in zinc than thirty-three per cent, I think to thirty-one per cent. That was not in shape so that we could prove it by documentary proof, except verbal advice.

Q. Was this higher grade of ore with which it was necessary to mix the lower grade fines produced rapidly enough in order to absorb the fines as fast as they were produced or was it necessary to stock fines in order to wait for a higher grade ore to be produced with which they could be combined?

A. The higher grade ore was not produced at the time in sufficient quantities to enable a mixture to be made containing those fines running up to thirty-one per cent or thirty-three per cent of zinc.

The Master: You mean to enable the mixture to be made continuously as the ore was produced.

The Witness: Yes.

Q. Among the shipments to Bartlesville was one containing some ore, which was drawn from Bin C, will you explain whether or not at the time the shipments were made, which are shown on Plain-[fol. 510] tiff's Exhibit 18a-f, you were attempting to regulate the amount of the ore shipped from the plant in any manner?

A. During the time when we were making the shipments billed out later in that bunch that was shipped to Bartlesville and received, we were attempting to hold our shipments down or below a certain

definite rate per month in the hope that by doing so, Beer, Sondheimer would accept the ore.

Q. Was that the cause of your storing any ore in Bin C during this period?

A. In answering that, I would be answering rather from my inspection of the exhibits in this case, than from my actual memory, but I am quite sure——

Q. (Interrupting.) Have you any personal recollection at this time as to whether at the time you were shipping ore to Bartlesville you were storing any ore in Bin C or not?

A. I have a personal recollection that we stored some ore at that time for that reason. I could not, except by reference to the exhibits, state positively that it was put in Bin C.

Q. What would be your explanation of the—can you explain the inclusion of ore from Bin C in this one shipment to Bartlesville—some ore from Bin C but not all from Bin C?

A. I believe the reason was that our production of zinc ore decreased in daily tonnage, so that we could increase it by taking from stock and still keep within the monthly rate which we were trying to keep within.

Q. Now do you remember by whom the daily assay sheets sent from the laboratory to the Metallurgical Department were signed in the ordinary course of business?

[fol. 511] A. They were signed by the chief chemist or in case he was away by his chief assistant.

Q. Were they to be signed by the man actually making the assays entered on them?

A. Not unless he just happened to be the chief chemist or his assistant who signed the reports.

Q. But they were not, did not purport to be, an original record signed by the man making the entries of them?

A. No, they did not.

Q. You testified on cross examination that the freight rate that you would have had to pay if you had continued to ship to Beer, Sondheimer & Company would have been higher than the one you actually paid when you shipped to the United States Smelting Company, did you not?

A. I believe I did.

Q. Will you state whether or not you are a traffic expert, Mr. Metcalf?

A. I am not.

Q. Will you state whether or not when you made that assertion you were giving what you considered to be the correct freight rate, or whether you were stating the freight rates which you would probably have paid as conditions were at that time?

A. I was stating the freight rate that I thought the railroad would have asked us to pay.

At this point several questions were asked and stricken from the record at the request of counsel for plaintiff.

Q. Did you state to Mr. Jerome that you considered that the freight rates you would have had to pay if you had continued shipping to Beer, Sondheimer & Company would have been based upon the value of the ore calculated under the terms of the Beer, Sond-[fol. 512] heimer & Company contract?

A. I believe I did say so.

Q. Would you consider that you would have had to pay that amount of freight if Beer, Sondheimer & Company had received the ore shipped by you, but had refused to pay for it?

Mr. Jerome: That is objected to. This is purely a question of law.

Overruled. Exception.

Question read.

A. I consider we would not.

Q. You are answering in the way you answered Mr. Jerome, not as you have since been advised your legal freight rate should have been. Do you want to change your last answer?

A. The question of time is in there. Right now I consider we would not. In 1915, it had not occurred to me that there was any proper basis for figuring that freight, except by figuring the value of the ore on the basis of the terms of the Beer, Sondheimer contract, but since then I have been advised by traffic experts and attorneys that that would not be the correct way of calculating the freight rates, particularly in the event of Beer, Sondheimer & Company refusing the ore.

Q. Answering this question, from the standpoint from which you answered Mr. Jerome on cross examination, would you have considered that you would have had to pay a freight rate based on the contract value of the ore whether or not Beer, Sondheimer & Company had paid you for the ore after they received it?

A. My answer to Mr. Jerome on cross examination was based on [fol. 513] my belief of what the railroad would have normally billed that ore out as to freight rates, rather than as to the question of what was the proper freight rate.

Q. Do you believe that the railroad would have billed that ore at the rate based on the contract value if Beer, Sondheimer & Company had received the ore but refused to pay you for it?

Mr. Jerome: Objected to.

The Master: I suppose it is incompetent on that subject. All this line of questions is admitted merely as the witness' explanation of his answer on cross examination. As I have not the minutes before me, I don't know whether Mr. Jerome called for his belief or not. If he did so, perhaps this question is competent.

Mr. Stockton: Do you remember Mr. Jerome?

Mr. Jerome: My recollection is that I did not.

The Master: Objection sustained. If there is something about the method of charging freights in such a situation you should call some traffic expert to explain it.

Mr. Stockton: I will. I was merely trying to bring out the fact that he testified from opinion on cross-examination.

Q. Mr. Metcalf, can you state whether the assays shown on Plaintiff's Exhibit—whether the assays or the shipments to Bartlesville shown on Plaintiff's Exhibit 18-a to 18-f, inclusive, represent the only assays made at Kennett on the ores that was shipped to Bartlesville [fol. 514] and dumped there and subsequently shipped to Altoona?

A. I can't answer that positively without referring to the record, but I rather think they do.

Q. Was any assay at Kennett on Altoona pulps drawn from that ore?

A. That is the point I am not sure about without referring to the exhibits themselves.

Q. In the ordinary course of business, were assays made at Kennett on pulps—

Mr. Jerome: I object, inasmuch as he has the records showing whether they were or not, and therefore should be answered from those, and not answered from the course of business.

The Master: Sustained: You had better get the testimony of the actual fact here instead of from the general custom.

Q. Will you state whether or not under the contract between United States Smelting Company and the Mammoth Copper Mining Company the assays which were to be compared were assays on pulp drawn at point of destination?

A. They were.

Q. The assays which were to be compared did not take into consideration assays on pulps drawn before the shipment was made from Kennett?

A. They did not.

Q. So that when a discrepancy appears on Plaintiff's Exhibit 16 between the Altoona assay and the Kennett assay on which the hypothetical settlement sheets were made up, that does not necessarily represent a case where there was an actual discrepancy under the terms of the contract between the Mammoth Copper Company and [fol. 515] the United States Smelting Company?

A. No, it does not.

Mr. Stockton: That is all.

Recross-examination by Mr. Jerome:

Q. Under this contract between the Mammoth Copper Mining Company and the United States Smelting Company sample was to be obtained at the point of destination, and each of the parties, that is, Mammoth and the Smelting Company were to have assays made of those samples and to compare them, were they not (handing witness paper).

A. That was provided in that letter.

Q. Was that done?

A. The samples were drawn at the point of destination and

generally pulps were sent to Kennett and assayed there, but I cannot say whether or not that was always done or not, but as a general rule, it was done and particularly it was done in the early shipments from Kennett to Altoona, and the comparison was made at Kennett between the Kennett assay and analysis and the Kansas City Assay and analysis of the same pulp, and they were found to check so closely and in fact, generally the Kansas City assays on those earlier shipments were slightly higher than the Kennett assays.

Q. You are testifying from?

A. (Continuing:) So that it did not seem worth while to strictly carry out the provisions of that letter about insisting on the settlement on a split or calling for an umpire.

Q. And when you speak of "that letter," you refer to this contract [fol. 516] between the United States Smelting and Mammoth?

A. Yes, of July, 21.

Q. Are there any records in evidence before the Master that show in any way the results of the assaying of samples sent from Kansas City in accordance with the terms of this contract between Mammoth and the United States Smelter?

A. Yes, there are.

Q. In evidence here?

A. Yes.

Q. What exhibits are they?

A. In almost every case—

Q. (Interrupting.) No. Just tell me?

A. In Exhibits 21 and 23.

Q. Are not Exhibits 21 and 23 the assays and analyses made before shipments,—answer that yes or no?

A. I cannot answer that yes or no.

Q. Do they show both?

A. In some cases they show both. In Exhibit 21 the sheets that you call the hypothetical sheets show the assays and analyses before shipment and the sheets called U. S. S. Co. settlement sheets ordinarily show both the Kansas City settlement assay and the Kennett assay on the Kansas City pulp—the Kennett analysis, I should say, on the Kansas City pulp.

Q. In Exhibit 21, the analyses on the hypothetical sheets are analyses made at Kennett before shipment, are they not?

A. Yes.

Q. And are not the analysis at all of pulp samples drawn from the equivalent lots at Altoona?

A. No, they are not.

Q. So that in Exhibit 21 save and except the settlement sheets between United States Smelter and Mammoth Company, there is nothing indicating any analyses made at Kennett of samples drawn [fol. 517] from shipments at Altoona?

A. No, there is not.

Q. And that is equally true of Exhibits 16 and 23?

A. I think it is true of Exhibit 23.

Q. Will you look at Exhibit 16,—is it true of Exhibit 16 also?

A. I think it is true of Exhibit 16 also, though 16 was as a matter

of fact—does not appear to have shown the Kennett analyses of the Altoona pulp.

Q. I am aware of that. But Exhibits 21, 16 and 23 contain nothing showing any analyses of pulp sent from Altoona to Kennett in accordance with the terms of the contract between the Mammoth Company and U. S. Smelter except in the settlement sheets between United States Smelter and Mammoth?

A. That is true.

Q. And in the settlement sheets do they show any fact, any data, which relate to analyses of pulp sent from Altoona to Kennett?

A. Yes.

Q. Where?

A. On the sheet headed United States Smelting Company dated August 30th.

Q. 1915, and forming part of Exhibit 21?

A. Referring to lot No. 1 in the column headed "Percent Zinc" on the second line it shows the shipper's assay was 41.1 per cent zinc,—the figures right below the U. S. Smelter Company assay of 42.5 zinc and the settlement assay on that lot was taken 42.5 zinc.

Q. Is that entry on that paper you refer to, shipper's 41.1 in the column "Per cent Zinc," is that an analysis of a pulp sample sent from Kansas City to Kennett, or is that the analysis at Kennett before shipment?

A. It is the analysis of the pulp sample sent from Altoona to Kennett.

[fol. 518] Q. Will you find in the shipments from Kennett to Altoona the lot referred to? (witness examines Exhibit 25-1.)

A. Yes.

Q. Will you point it out to me?

A. At the top line of Exhibit 25-1.

Q. And what is the zinc analysis there?

A. Zinc analysis there is given as 41.1.

Q. Is it true that in Exhibit 21, in all the settlement sheets between Mammoth and U. S. Smelter, the zinc percentage entered as the shipper's percentage corresponds exactly to the entries of zinc percentages in the shipment sheets Exhibits 25-1 and subsequent entries?

A. No, that is not true.

Q. How generally is it true?

A. I could only answer that by comparing all of the—

The Master (interrupting): All of the settlement sheets, with Exhibit 25.

The Witness: It is not true of Lot 5; it is not true of Lot 7; it is not true of Lot 8.

Q. Can you tell me from an examination of Exhibits 21 and 23 at what time pulp assays and analysis of pulp samples received from Altoona ceased at Kennett?

A. No.

Q. Starting with the settlement sheet in Exhibit 23 of date November 18, 1915, will you please examine that lot 99, and state

whether after that date there were any analyses of pulp samples from Kansas City made at Kennett,—you might modify that question to this extent: That after the date mentioned in the question do there appear on these settlement sheets to have been any analyses made of pulp samples from Kansas City at Kennett?

A. (Witness examines papers.) No further shipper's analyses [fol. 519] for zinc appear after the date mentioned.

Q. And wherever in Exhibits 16, 21 or 23 in the settlement sheets, there appears to be no shipper's analyses entered, you cannot say whether or not there was a pulp sample from Kansas City analyzed at Kennett?

A. I think I cannot, though it is possible that in that book which is an exhibit, called the Control book, there might be some later Kennett analyses of pulp samples from Altoona.

Q. The same chemical force, assay force, at Kennett, made the analyses that are entered on these different sheets, representing shipments as analyzed of pulp samples from Kansas City, did they not?

A. Yes.

Q. You have been interrogated in regard to the practice at Kennett in making these assays and analyses and their entry. It is not true that where gold and silver were concerned in these various entries, there was first a certain number of grammes taken from the sample, and the percentages of gold in that number of grammes was determined, and then the entries were made as they appear in the exhibits here from those calculations showing the actual amount of gold and silver per ton found, and not the percentages of gold and silver showing it in ounces?

A. No, I don't think that is true.

Q. How did they do it, if you know?

The Master: You mean in the laboratory reports?

Mr. Jerome: Yes, sir.

Q. Do you know how the chemists worked whether they worked [fol. 520] from grammes or ounces in the first instance?

A. I know what the general practice—

Q. I want what was done in the assay laboratory and analytical laboratory at Kennett. Did they work originally in grammes or ounces?

A. If you want me to reply only as to what I can testify from from having actually seen what they did, I cannot answer that question.

Q. The actual entries of percentages in these different shipment sheets that are in evidence here, and a production sheet, the entries there of gold and silver are not percentage entries, but represent the actual amount in ounces per ton of ore, assuming that a ton of ore corresponded to the sample, as for instance, if you got in one of these shipment sheets .125 under the column "Au." taken there, there would be .125 of an ounce of gold in a ton of that ore?

A. I could hardly answer that because you made an assumption which is not correct. That is, you assumed that a ton of ore corresponded to the sample and the sample was not a ton, you know.

The Master: You can take the sample as something by which to test the whole shipment?

The Witness: Yes.

Q. In charging Beer, Sondheimer & Company you assumed that the rest of the ton ran according to the sample, didn't you?

A. Yes.

Q. I make that assumption then. Assume that you had a ton of ore you were about to ship, and a sample from that was taken, and assume that that sample was fairly representing the metallic contents [fol. 521] of that ton of ore when the chemist's report of assays, reported that there was .125 of gold, and that was entered in one of these shipment sheets under the column entitled "Au.," that amount there was .125 of an ounce of gold in a ton, or was designated to so represent?

A. Yes, that the ore assayed was so many ounces per ton.

Q. But as to other metallic contents the entries in the shipment sheets did not indicate the actual quantity that it was assumed that the analysis showed a ton contained, but represented the percentage of a ton?

A. It represented the actual quantity just as fully as the statement as to gold and silver.

Q. But gold gave the quantity of the actual metallic contents. Assuming in regard to that—as a matter of fact, just what I have in my question in regard to gold—the entry on these shipment sheets in regard to gold and silver represented the actual gold metallic contents in a ton, whereas in regard to zinc it represented the percentage of zinc in a ton?

A. In both cases the figures represented the proportion of certain metals in the ore. In the case of gold and silver that proportion is expressed in ounces per ton, where in the case of zinc it is expressed in percentage.

The Master: It is a percentage of weight?

The Witness: Yes.

Q. Percentage of weight in the ton?

A. Yes.

Q. So that if under the column "Au." you had "1," it would mean that if the rest of the ton corresponded with the sample assayed, [fol. 522] there would have been found, if you could have extracted it perfectly, an ounce of gold?

(Discussion off the record.)

Q. When you found an entry of "1" under the Column "Au." in these shipping sheets, it means that in the opinion of the chemist, if that sample was a fair sample of the ton, that there would be found under perfect methods an ounce of gold in that ton?

A. Yes.

Q. And when it stated in regard to the same shipment in the column "Zinc," "38," it meant that 38 per cent. of 2,000 lbs. would be the amount of zinc found?

A. Yes.

Q. The ore body at Kennett was approximately 10,000 tons as you estimated it—was not all zinc ore of 33 per cent. You mean—the ore body in the mine was much larger than that, and very little of it was in shape, so that it could be shipped as 33 per cent. zinc ore without concentrates. The total amount—without sorting I mean—the total.

Q. Was it not greatly in excess,—a joint capacity of 20,000 tons?

A. In what period?

Q. Within the period during which you mined these 20,000 tons, if it amounted to that, of zinc ores?

A. Yes.

Q. On this question of freight had you delivered, from the time that you began to dump at Bartlesville, had you delivered all the zinc ore to Beer, Sondheimer that you subsequently mined of a grade as called for by their contract, and it had been accepted by Beer, Sondheimer & Co., and used by them in their smelters or disposed of, or as they pleased, when you came to settle with Beer, [fol. 523] Sondheimer & Company, would you not, and have you not always considered, that they would charge you with the freight and pay you the difference due?

A. That was the regular practice, and if we raised no question about it, that is probably what they would have done.

Q. So that, if Beer, Sondheimer & Co. had been in arrears for payment right up to the end of the contract, but because of financial reasons, Mammoth had not pushed them and had not brought the contract to an end—if you at all times believed both before and after talking with Mr. Sutro that—what Beer, Sondheimer & Company would have owed you would have been the total amount as calculated in your hypothetical settlement sheets, less the actual freight to Bartlesville paid by Beer, Sondheimer & Company and charged against you?

A. No.

Q. This tabulation of zinc shows a discrepancy in a number of cases of 1% or upwards. Is it not the fact that it shows an average discrepancy of 1% and upwards between the pulp samples sampled at Kennett and pulp samples sampled at Kansas City?

A. I think no.

Q. In Plaintiff's Exhibit 104, I find under the entry, Kennett, Exhibit 16.—"Kennett assaying and sampling average, lots 35 to 66,—38.29"—that refers to zinc contents, does it not?

A. Yes.

Q. And does that refer to assaying and sampling of pulp samples sent from Kansas City by the United States Smelter Company?

A. It does not.

Q. Does it include those?

A. No, it does not.

Q. I show you one of these exhibits that was presented upon the trial of this action and received in evidence by the Court being a [fol. 524] memorandum of amount claimed to be due from Beer, Sondheimer & Company without interest. I call your attention to

the item on the first page of this exhibit, "Deduction for concentrates, \$23,754.53." In these various sheets put in evidence here of production and shipments, do those concentrates appear anywhere?

A. Yes, they do.

Q. Where do they appear, Mr. Metcalf?

A. Most of it, not all of them, appear on this Exhibit 25-1 to Exhibit 25-15.

Q. And in what way are they indicated there?

A. They are ordinarily indicated in the same column which shows the plant lot numbers by the letters preceding the special lot number "J. P." standing for "jig products" and "M." standing for "midlings."

Q. So that in looking at these shipment sheets Exhibits 25-1 to 25-15, where a number is preceded by "J. P." or "M" we may take it to refer to this item that I have quoted "deduction for concentrates, \$23,754.53?"

A. Yes.

The Master: The Exhibit to which Mr. Jerome has referred in his question is a typewritten paper in three sheets purporting to be memorandum of amount claimed to be due from Beer, Sondheimer & Company without interest.

Q. Now, when did you discover that these concentrates were improperly included in the shipments shown in your Exhibit 25-1 to 25-15?

A. In 1916 about the time we planned to institute suit against Beer, Sondheimer & Company.

Q. Was that before or after you prepared exhibits, tabulations, [fol. 525] Exhibits 16-21 and 16-23?

A. It was in the process of having those exhibits prepared that it was noted that these concentrates were included.

Q. And about what time do you say you discovered,—your recollection of the discovery that they were improperly included?

A. In 1916.

Q. Are any of them included in Plaintiff's Exhibit 21?

A. No, there are none in Exhibit 21.

Q. Only in Exhibit 23?

A. Yes.

Q. Then do we find an entry in Plaintiff's Exhibit 23, entries, which include these concentrates?

A. There can be found in Exhibit 23 shipment lots which Exhibits 25-1 to 25-15 show to have been composed in part of concentrates.

Q. And at how late a period in time in Exhibit 23 can such entries be found?

A. Up to lot 146 of the shipments to Altoona and to lot 6 of the shipments to Iola.

Q. What are the dates of those?

A. Up to February 26, 1916.

Q. And that is the last one, the very last one, of the hypothetical settlement sheets contained in Exhibit 23, is it not?

A. Yes.

Q. And the preceding settlement sheets in Exhibit 23, hypothetical settlement sheets, some of them contain these concentrates?

A. Some of them do.

Q. When were these hypothetical sheets prepared?

A. 1916.

Q. Before or after this question of concentrates had arisen?

A. Contemporaneous,—that is in the process of making up these hypothetical sheets it was discovered that some of the shipments contained concentrates.

[fol. 526] Q. Were the corrections then made in the hypothetical settlement sheets excluding those concentrates?

A. They were not made at that time.

Q. Have they since been made in Exhibit 23?

A. Not in Exhibit 23 but on Exhibit 98.

Q. What was the date that Exhibit 23 was put in evidence under the deposition, do you remember approximately?

The Master: Whose deposition was it?

The Witness: Rix's deposition.

Q. It was about January, 1920?

A. Yes.

Q. And it was put in evidence just as it now stands without any of those corrections?

A. Yes.

Q. The exhibit we refer to as Exhibit 98 is an exhibit produced at the trial for the first time, is it not?

A. Yes.

Q. And the trial was on the 14th of June, 1920—we will assume it was about on that date?

A. Yes.

Q. Now calling your attention to Plaintiff's Exhibit 29, the deposition of J. C. Rix, do you remember approximately when that was put in evidence?

A. January, 1920.

Q. This entitled "Amount due Mammoth Copper Mining Company from Beer, Sondheimer & Company on account of ores included in suit Robertson against Garvan, exclusive of interest," do you know when Plaintiff's Exhibit 98 on the trial was prepared?

A. Approximately.

Q. When.

A. About the same time.

Q. About the same time as what?

A. The same time it was put in, that is within a day or so previous to its being presented in court.

[fol. 527] Q. So up until the 14th day of June, 1920, there has appeared no where in any of these depositions any allowance at all to Beer, Sondheimer & Company for these concentrates, is that correct?

A. I think that is correct.

Q. And all the exhibits in evidence here contained in the claim

against Beer, Sondheimer & Company this element of concentrates amounting to \$23,754.53?

A. You are asking me if they amounted to that much?

Q. As shown by Exhibit 98 on the trial?

A. Yes.

Re-redirect examination by Mr. Stockton:

Q. Will you state whether or not there was a difference of opinion between yourself and Mr. Heintz, the general manager of the United States Smelting Refining & Mining Company and Mr. Eardley, who was general manager of the United States Smelting Company and Mr. Robertson who was vice president of the United States Smelting Refining & Mining Company, as to whether jig products and middlings properly came within the meaning of concentrates as used in the Beer, Sondheimer contract?

A. There was such a difference of opinion.

Q. What was your opinion?

A. My opinion was that the jig products and the middlings was a concentrate within the meaning of the Beer, Sondheimer contract.

Q. Will you state what was the opinion of the other men?

A. The opinion of the other men was that concentrates properly referred to fine material such as is produced by a flotation machine, [fol. 528] and that the intent of the contract was for Beer, Sondheimer not to be forced to accept such extremely fine material which was difficult to treat, but that they could not conceivably have meant to keep out of the contract material in all essential respects exactly like the coarse Kennett ore except that it had been produced by mechanical means instead of hand sorting.

The Master: A concentrate is the crude ore put through a preliminary process of washing, or some—

The Witness (interrupting): Mechanical means separating the better from the worse.

The Master: It is a process of getting rid of a lot of waste material.

The Witness: It does. But by the process of hand sorting you likewise get rid of the waste materials.

Q. Do you remember at what time the conclusion was reached in conference that it would be necessary to withdraw the jig products from our claim?

A. It was during the progress of the trial before Judge Hand, whatever that date was.

Q. Was that conclusion reached after a conference between yourself and Mr. Robertson and Mr. Heintz and Mr. Eardley?

A. It was.

Mr. Jerome: And Mr. Robertson was what officer of the parent company?

The Witness: Vice President.

Q. Mr. Metcalf do you know in what book a record was kept of the analyses of the samples drawn at Altoona which was analyzed at Kennett?

[fol. 529] A. In the assay office record book, called the "Control Book."

Mr. Jerome: Do you know of your own knowledge what you are testifying to now.

The Witness: Yes. I recognize this book. Let me modify that. I recognize this book as being exactly similar to the usual Kennett assay office record books, and as being in the handwriting of the man who made those books.

The Master: In the handwriting of chemists employed in the laboratory at Kennett?

The Witness: Yes.

The Master: Do you recognize the book itself as one you have seen at Kennett?

The Witness: Whether: Whether or not I have seen this particular book before I cannot say.

Q. Can you state whether it was the custom to record in a book the results of the Kennett analyses on the Altoona sample, denoting the sample by the number of the car in which the shipment was received at Altoona?

A. It was in all such matters. Such assays were sometimes recorded by reference to the car number and sometimes by the lot number.

Q. Which lot, shipment or plant?

A. Shipment lot, and as to these particular records, I could not say which way they were recorded.

The Master: The book referred to as the control book is Exhibit 50 of Mr. Ball's deposition.

[fol. 530] Re-recross-examination by Mr. Jerome:

Q. How, as you understand it in this Exhibit 50, are analyses of pulp samples, from Kansas City indicated?

The Master: This is just for an illustration.

Mr. Jerome: As an illustration.

A. On page 71 I find certain entries marked "Altoona zinc, lots 7 and 8, giving the amounts of zinc and of lime in those two lots.

Q. And while you cannot testify as to your own knowledge in regard to this,—just so that I understand the Exhibit myself—it is your understanding that that means those were analyses of pulp samples sent from Altoona or Kansas City to Kennett, and had reference to this zinc ore that would otherwise have gone to Beer, Sondheimer & Company?

A. Yes.

The Master: Do those numbers appear to you to indicate shipment lots or plant lots?

The Witness: They appear to me to indicate shipment lots.

Q. And those particular entries that you have referred to show no analyses for gold or silver?

Mr. Stockton: I will stipulate there was not any made on those samples,—they only analyzed for zinc on those samples.

Q. Is it not the fact that in the pulp samples sent from Altoona to Kennett, these ores shipped to Altoona, or from Kansas City to [fol. 531] Kennett,—no analyses or assays were made for gold or silver?

A. There were none made on the Altoona pulp.

Q. So then your hypothetical settlement sheets, so far as gold and silver are concerned are based wholly upon analyses made at Kansas City?

A. No.

Q. What are the bases?

A. The hypothetical settlement sheets in Exhibits 21 are based exclusively on the gold, silver and copper assays and analyses made at Kennett on the Kennett Plant Lot. The assays for gold, silver and copper shown on the hypothetical settlement sheets in Exhibit 16 are based exclusively on the composite assays calculated in those respective shipment lots on the assay calculation sheets, Exhibit 18-a to Exhibit 18-f inclusive. The assays or analyses for gold, silver and copper shown on the hypothetical settlement sheets in Exhibit 23 are based mostly, if not altogether, on the Kansas City returns for gold, silver and copper.

Q. As for gold and silver then the hypothetical settlement sheets are based on the Kansas City reports?

A. Do you want me to repeat my answer? I just explained they were not in all cases.

Q. In what percentage of cases?

The Master: He took up by these groups of lots.

Q. After you began to ship directly to Altoona and Iola, Exhibits 23, were the hypothetical settlement sheets, so far as gold and silver are concerned made up entirely from Kansas City reports?

A. I think they were, but I would not like to make that conclusive [fol. 532] without examining each one and checking it up.

Q. In these actual settlement sheets attached to Exhibit 23, I find nowhere so far as I have examined them, any entry of shippers' analyses except under zinc, but I do find entries of settlement assays under the column "Gold" "Silver" and "Copper." Do they not therefore show that as far as gold, silver and copper went in these shipments referred to in Exhibit 23, the settlement between the Mammoth Company and the United States Smelter was based wholly upon an analyses or assay made by the United States Smelter?

A. No.

Q. On what were they based then?

A. They were based in part on the amounts received by the United States Smelting Company from shipments to certain other smelters of the residues produced from the Kennett zinc ore.

Q. So far as Kennett was concerned in the ores covered by Exhibit 23 with respect to gold, silver and copper there were no analyses or samples sent from Kansas City made at Kennett?

A. Will you repeat that question?

Q. Let me put it this way,—read the question? (Question read.)

The Master: With respect to those samples you did not make an examination of samples sent back from Kansas City after you had shipped—

The Witness (interrupting): It appears from these sheets that Kennett made no analyses on the Kansas City pulps for gold, silver and copper.

[fol. 533] Q. And in the hypothetical settlement sheets annexed to Exhibit 23 of gold and silver contents of ore all shipments to Iola or Altoona were based wholly upon the analyses sent to Kennett which was made at Kansas City?

A. I believe that to be true, but I have not checked each individual settlement.

Mr. Jerome: That is all.

Re-redirect examination by Mr. Stockton:

Q. Do I understand you that the gold and silver which was shown on the hypothetical settlement sheets came from Altoona?

The Master: You mean in Exhibit 23?

Mr. Stockton: Yes.

A. Yes, from Kansas City.

Q. Gold, silver and copper, the figures on the hypothetical settlement sheets?

The Master: As distinguished from the Smelting Company settlement sheets?

Mr. Stockton: As distinguished from the Smelting Company settlement sheets?

Q. These figures on the hypothetical settlement sheets came from Kansas City, did they?

A. That is my belief, though I have not checked all the sheets.

The Master: You mean they were probably taken from the settlement sheets of Kansas City?

[fol. 534] The Witness: I mean the intention was on that Exhibit 23 to make the settlement exclusively on the Kansas City weights and assays, though it is possible in some particular cases that we did not have the results of Kansas City assays for gold, silver and copper, and therefore used Kennett, but I am not sure whether or not that ever occurred.

Q. Do you remember—

The Master (interrupting): You would use the assay made at Kennett before the stuff had been shipped to Altoona.

The Witness: If we had no other and better information we used such assay.

Q. Do you know whether in making the assays at Kennett, the chemists in arriving at an assay such as is shown on Plaintiff's Exhibit 101-d on the line having the plant lot 93 under the column headed "A. U. 1-O" arrived at that figure by computation, or got it directly from the scales on which they were weighing up the gold ore button?

A. As to that particular case I could not say positively.

Q. In the ordinary course of business—

The Master: He means taking that as an illustration of similar entries in the exhibits.

Mr. Stockton: I am taking that as an illustration.

The Witness: In general, in making and entering such a de-[fol. 535] termination for gold, the process would be to weigh in grammes, and if the weight of the samples from which that was obtained was what is known as one assay ton, that weight in grammes would be the same figure as would be the number of ounces in a ton of the ore, and therefore he would enter that particular figure in his assay records as ounces per ton, but if he used a different weight of sample to start with, as they sometimes do, he would have had to make a computation to turn that gramme weight into the proper figure to represent ounces per ton.

Q. Do you know which custom was followed at Kennett?

A. I think they did both ways at times on different ores, as a matter of convenience.

Re-re-cross examination by Mr. Jerome:

Q. Was it not the usual custom both at Kennett, and within your experience in all assays and analyses in reference to metallic contents of ore for the chemists to work in grammes and report in ounces and percentages?

A. That is the usual custom.

Q. And is it your understanding that that was the practice pursued at Kennett?

A. It was the general practice at Kennett.

Adjourned to October 7th, at 10:30 A. M.

[fol. 536] GEORGE W. METCALF, recalled for the plaintiff.

Direct examination by Mr. Stockton:

Q. Mr. Metcalf, did you make any search for records of the Kansas City Smelting Company affecting the Mammoth ore which was received by the United States Smelting Company?

A. I did.

279

Q. Will you state first how you ascertained where such a search should be made?

A. I inquired of Mr. G. W. Heintz, who was the general manager of the United States Smelting Company at the time of these transactions.

Q. During the years 1915, 1916?

A. 1915 and 1916. A. (Continuing:) As to what became of the Kansas City records of the company at the time that the Kansas City office was closed, which I think was about the end of 1917, and he informed me that they had all been boxed up and shipped to a plant, a mill that the company was operating at or near Baxter Springs, Kansas, and with Mr. Hjortsberg, who has given a deposition in this suit, I went to Baxter Springs and unpacked a lot of these records which were still in the original boxes.

Q. Just a minute. Did Mr. Heintz advise you that all the records of the United States Smelting Company which had been kept would be found at Baxter Springs?

A. Yes, he did.

Q. What did you find?

A. And I searched through their vault there. Some of the records had been unpacked from the boxes and put in the vault, including these large books, Exhibits 13, 14 and 15, but the smaller records, like assay certificates and weight and moisture reports, and [fol. 537] information of that sort, we failed to find in this vault, and we opened up these wooden boxes that had not yet been opened, and searched through all of them, taking out everything we found that seemed to have any possible reference to the ore concerned in this suit.

Q. Will you state whether you found any weight and moisture certificates,—any original weight and moisture certificates besides the ones which have been introduced in evidence, which have been marked for identification Exhibits 107-1 et seq.?

A. At Baxter Springs I did not find any weight and moisture certificates that affected the ore in this suit. These particular ones that have just been marked for identification were sent to me at Kennett, California, in 1916, on my request to Mr. Eardley to send me the weight certificates covering this ore.

Q. Did you make a search for the assay sheets upon which the chemists made their reports from the local plant offices concerning the assays?

A. Not specifically. Will you read that question?

(Question read.)

A. Yes, I did.

Q. Did you find any assay sheets besides those which are contained in books numbered 12, 13, 14 and 15, headed "Iola," and "Altoona," laboratory reports, and bearing various dates which were introduced in evidence as Plaintiff's Exhibits 45, 46, 47, 48, 49, 41, 42, 43 and 44?

A. I found no laboratory reports or assay certificates covering any

of the ore included in this suit except these that have been introduced [fol. 538] in evidence, and which you enumerate.

Q. Did you find any of the original weighmaster's scale house reports which are mentioned in Mr. Dodd's, and in Mr. Rankin's testimony?

A. No, I did not.

The Master: These were Altoona reports?

Mr. Stockton: These were Altoona and Iola reports made by the weighmaster.

Q. Did you find any of the original bills of lading which were forwarded from Kennett covering the shipments from Kennett to Altoona?

A. I think not, but I would have to look at a letter I wrote at that time. The copies of those bills of lading were all out at Kennett, so if I found other copies at Baxter Springs it did not make a special impression on my mind.

Q. Did you write a letter at that time purporting to show—showing the documents which you have mentioned?

A. I wrote a letter to you at that time telling just what documents I found at Baxter Springs.

Q. Did you make any attempt to locate a chemist by the name of Thurston, who was formerly employed by the United States Smelting Company?

A. I did.

Q. He was at Altoona, wasn't he?

A. Yes.

Q. Will you state what efforts you made to locate him?

A. I inquired of Mr. Eardley and of Mr. Muir, who is now manager of the parent company's operations in Kansas, and Mr. Paylor, who at that time was chief clerk for the company at Baxter Springs, and Mr. A. R. Campbell, who succeeded Mr. Eardley as manager [fol. 539] of the zinc department of the United States Smelting Company, and several other people, I don't recall their names right now.

Q. Were you successful in locating him?

A. I was not.

Q. Did you make inquiry of every person whom you had any reason to believe would know of the whereabouts of Mr. Thurston?

A. I did.

Q. Did you make any inquiries concerning a Mr. C. H. De Witt, who was employed at Altoona as chemist?

A. Yes, I did, and from some person, I am not sure whether it was Mr. Eardley or Mr. Renner, I obtained an address in Chicago purporting to be the address of Mr. De Witt, but I wrote Mr. De Witt at that address and never received any reply. I endeavored to find out for sure if he was there in order that we might get him to testify to the assay certificates of laboratory reports which he signed.

Q. Did you ever get any reply to that letter?

A. I never got any reply.

Q. Did you make any attempt to locate a man by the name of Benus Swirski, who was employed as an assistant chemist at Iola?

A. I did inquire of practically the same people that I inquired before without getting any information.

Q. You made inquiry at all sources from which you thought you might be able to ascertain his whereabouts?

A. Yes.

Mr. Stockton: That is all.

Recess until 2.15 P. M.

[fol. 540]

After Recess

Direct examination of Mr. METCALF continued by Mr. Stockton:

Q. Did you refresh your recollection during recess by reading the letters you wrote me at the time you searched for records at Baxter Springs?

A. Yes, I read the copy of the letters I sent at that time.

Q. Did you find from that letter that you had found the original bills of lading for the ore shipped from Kennett to Altoona?

Mr. Tibbetts: I object to that question in its present form.

Q. Did you find the original bills of lading at the time you searched at Baxter Springs for the ore shipped from Kennett to Altoona?

A. Yes, I did in practically all cases, not quite all cases.

Q. Are these those bills of lading (handing witness a number of papers)?

A. Yes, these are.

Mr. Stockton: I offer them in evidence subject to cross examination.

Papers referred to marked Plaintiff's Exhibits 108-1 et seq. in evidence.

Mr. Tibbetts: No objection.

Q. Did you find at the time you searched at Baxter Springs the original settlement sheets for the residues which were shipped to Chrome, New Jersey?

A. Yes, I did.

Q. Will you state whether those are the settlement sheets that you [fol. 541] found (handing witness a package of papers)?

A. These are, with certain papers attached, among other things, typewritten copies of bills of lading.

Mr. Stockton: Will you object to their introduction in evidence?

Mr. Tibbetts: I think you should connect these by same witness with the Mammoth ore, as there is nothing on the face of them showing that they are Mammoth ore.

Mr. Stockton: I ask that the papers be marked for identification.

Papers referred to marked Plaintiff's Exhibits 109-1 et seq. for identification.

Cross-examination by Mr. Tibbetts:

Q. Did you ever come in personal touch with the Kansas City office of the United States Smelting Company during its existence?

A. I never was there, no.

Q. And you were never personally acquainted with the accounting methods or books or records they kept there?

A. No.

Q. So that when you set out to find books and records, you were compelled to rely upon the information which you obtained from others who were more familiar with the personnel of the force, and with the methods? Is that correct?

A. In a way, it is correct. When I found one man that would know anything about the case, I asked him who would know certain features, and then I tried to look them up.

Q. But you had no acquaintance with any of these men outside [fol. 542] of the executive officers?

A. Not until after I started trying to find men who knew about this matter.

Q. As to Mr. Heintz, had he been in direct charge of the Kansas City office?

A. No. He was—you might say he was in general charge.

Q. Where had his headquarters been?

A. In Salt Lake City.

Q. But he was not in personal touch with the Kansas City office, was he?

A. No.

Q. You said that you sent on for the weight certificates to Altoona, and in response to your request, you received these certificates which have been marked Exhibits 107-1 et seq. for identification. When you received these, did you call the attention of Mr. Eardley, or his office, to the fact that they were not complete?

A. I don't just remember whether I did or not. I am not sure whether just one bunch of these were put in evidence this morning or not; there are two bunches of originals. In addition to that, there was another bunch of weight certificates which did not bear this received stamp which appears on these. I think some of them were marked "Copy," and I assumed from that, that Mr. Eardley had been unable to find the other originals, and I may not have asked him specifically about that point.

Q. You mean you received at the same time you received these certificates, this Exhibit 107, other certificates which purported to be copies?

A. Yes, or which I understood to be copies. Those copies and these originals together, I think, made up a full set.

Q. Are you clear that they did?

A. Not absolutely.

[fol. 543] Mr. Stockton: I may say at this time, Mr. Tibbetts, I will offer to introduce those copies now if you so desire.

Mr. Tibbetts: It is not a question of what I desire; it is a question of what you want to do.

Mr. Stockton: I just want that on the record.

Q. Where did you say that you looked for the assay sheets. Was that at Baxter Springs?

A. Yes.

Q. Did you find any assay sheets covering any ores?

A. Yes.

Q. Did they cover ores that were received or assayed during any part of the period covered by this ore in suit?

A. Yes, and by assay sheets I mean both what we call assay certificates and laboratory reports. I found some of both, all that I found that appeared to affect the ore in this suit are in evidence.

Q. But there are no assay sheets?

A. What do you mean?

Q. There are no assay—do you mean that you found what have been termed the assay certificates which were used in the Kansas City office by the witnesses Munster and Butler in making up their settlement sheets? Did you find any of those?

A. I think I found a few of them.

Q. For other ores?

A. For other ores, I think.

Q. Covering some part of this same period—

A. (Interrupting.) And I am rather inclined to think that in the assay certificates that are in evidence there may be one or two which are those which Mr. Eardley made out; I am not quite positive about that.

[fol. 544] Q. And you found the laboratory certificates and reports for other ores during this same period covered by these shipments of ore here in question, did you?

A. For some others.

Q. For some other ores?

A. Yes, sir.

Q. Now, as to the chemist Thurston, what information did you obtain in regard to him?

A. As well as I recall at this time, I did not obtain any information as to where I would be apt to find him; no one seemed to know.

Q. Where had he been employed by the United States Smelting Company?

A. So far as I know, he had only been employed at that one assay office.

Q. And what was that?

A. I think that was the Altoona office, but it would show according to which office the certificates of which he signed.

Q. Did you go to Altoona to try to find him?

A. No.

Q. Did you send any one to Altoona or request any one in Altoona to make a personal investigation there?

A. I don't recollect whether I did so or not. I don't recollect doing that specifically. In general, I asked everybody that I came in contact with about these different men.

Q. But you did not inquire at the place where he had formerly worked?

A. No, I did not go there myself.

Q. As to the chemist De Witt, had he been employed at the Altoona laboratory?

A. Yes.

Q. And you say as to him you found, you obtained an address, or which you were informed had been his address, in Chicago after he left Altoona?

A. Yes.

Q. And you wrote him at that address?

A. Yes.

Q. Was the letter returned?

A. No.

[fol. 545] Q. You just wrote the one letter?

A. Yes.

Q. Did you make any personal effort in Chicago to look him up?

A. No.

Q. Did you request anyone else to make a personal search for him at Chicago, or personal inquiries at that address?

A. No, I did not.

Q. As to this man Swirski, he had been a chemist at Iola?

A. I hardly know whether his job would be dignified by the name of chemist or not. He worked there.

Q. He was in the Iola laboratory?

A. Yes.

Q. And what information did you obtain about him?

A. None at all; no one knew where he would be apt to be found.

Q. As to him, you made no personal inquiries in Iola, or had anyone else make personal inquiries there?

A. No, I did not. I would rather like to make an explanation there. The Iola and Altoona plants, after they were shut down, we sold for junk or scrap to certain parties, I don't know who they were, and this information is not first-hand on my part; it came from Mr. Heintz.

Q. Which information?

A. Those plants were sold, and no longer belonged to the parent company in any way.

Q. But so far as you were informed, these various chemists at Altoona and Iola—well, they were employed in the laboratories there.

A. Yes.

Mr. Tibbetts: That is all.

[fol. 546] WALTER H. EARDLEY, a witness called on behalf of the plaintiff, being duly sworn by the Master, testified as follows:

Direct examination by Mr. Stockton:

Q. Mr. Eardley, were you employed by the United States Smelting Company during the years 1915 and 1916?

A. Yes.

Q. In what capacity?

A. Manager of the zinc mines and smelters.

Q. Where were your offices located?

A. In Kansas City, Missouri.

Q. Over what smelters did you have supervision?

A. Altoona, Kansas; Iola, Kansas; La Harpe, Kansas; Chccotah, Oklahoma.

Q. When did you first enter the employ of the United States Smelting Company?

A. About 1904.

Q. In what capacity at that time?

A. Metallurgical clerk.

Q. What positions have you held with the company subsequent to that time?

A. I was ore settlement clerk from about a month after I entered their employ, until 1908. From 1908 until early in 1915, I was ore purchasing agent for the company, with headquarters in Salt Lake City. From 1915 till 1917 I was manager of zinc mines and smelters.

Q. As such ore purchasing agent, what were your duties?

A. To buy ores for the United States Smelting Company at Midvale, Utah, and I also purchased some ores for the Needles Mining and Smelting Company at Needles, California, and for the Mammoth Copper Mining Company at Kennett, California. In that connection [fol. 547] I also negotiated for the sale of such ores as the United States Smelting Company sold from their mines, or from ores purchased, and I also sold under Mr. Metcalf's direction, some ores of the Mammoth Copper Mining Company.

Q. At what time did you become manager of the zinc products of the United States Smelting Company?

A. June, 1915.

Q. At that time did you have your office at Kansas City?

A. Yes, sir.

Q. Will you state when the United States Smelting Company acquired the Smelters at Altoona and Iola?

A. The Altoona plant was purchased in June, 1913.

Q. From whom?

A. From the La Harpe Smelter Company. The Iola plant was purchased from J. B. Kirke of Iola, Kansas, we taking over operations on July 2, 1915. I don't just recall the date we took over the Altoona plant, but it was the latter part of June.

Q. Are you familiar, generally, with the system for recording the amounts of ore received at the various plants at Altoona and Iola?

A. In a general way.

Q. Are you familiar with the purpose of keeping the ore received book and the ore purchased book?

A. In a general way. It was done under the supervision of the cashier, who had charge of the accounting work at Kansas City of the smelters.

Q. Will you state, if you can recollect, when the Mammoth Copper Company's ore first began to arrive at Altoona?

A. I would say the first shipment was somewhere about the first of August, 1915.

Q. Will you state under what agreement you received these ores [fol. 548] from the Mammoth Copper Mining Company?

A. I wrote Mr. Metcalf a letter, I think it was on July 21st, advising him of the terms under which we would receive and pay for such ores.

Q. Will you state whether or not those terms were the—

The Master (interrupting): That is the letter that is in evidence as the contract between the Smelting Company and the Mammoth Copper Mining Company?

Mr. Stockton: That is the letter, yes.

Q. Will you state whether or not those terms represented the going terms for zinc ore?

A. In my opinion, they did.

Q. In your opinion, could you have secured an equal amount of ore of the same quality from other concerns at as favorable a price as the United States Smelting Company did for the Mammoth ore?

Mr. Tibbetts: Objected to; it is opinion evidence.

Objection overruled. Exception.

A. I could have purchased other ores which would have yielded the United States Smelting Company as large a profit as the ores it received from the Mammoth Copper Mining Company.

Q. Could you have purchased other zinc ores which it would have been as convenient for you to smelt, and which would have yielded the same returns in zinc as the Mammoth ore did, for approximately the same price that you paid for the Mammoth ore?

A. Yes.

[fol. 549] Q. Will you state what arrangements you made at that time for the handling of the residue products in the Mammoth ore?

A. Under the contract we had with the Mammoth Copper Mining Company, we were to return them the residues for their account. I entered into an arrangement with the Chrome Plant of the United States Metals Refining Company for the receipt of a certain quantity of residues at a certain price. Subsequently I went to Denver and entered into negotiations with the American Smelting & Refining Company, and arrived at a basis under which we would ship the residues to them, which we did.

Q. Was there any reason why it was preferable to ship to the American Smelting & Refining Company rather than to the United States Metals Refining Company?

A. I got a better price.

Q. Will you describe just briefly the general process for refining zinc ores and the manner in which residues were obtained, and which were subsequently shipped to the American Smelting and Refining Company?

A. You want me to follow the smelting process from the beginning to the end?

Q. Just briefly, yes.

A. When the ore was received at the plant it was weighed over a railroad scale, after the railroad scale had been placed in commission, and weighed; after being weighed heavy, it was weighed light, to arrive at the tare weight. The ore was then dumped into receiving bins. At the time it was dumped into receiving bins it was sampled. When we desired to use any of this ore, the men would take the ore from the bin,—in this particular ore, they would put it through the crusher and through sets of rolls to reduce it to not exceeding two [fol. 550] millimetres in size, which is approximately six mesh. It would then go to the roasting plant, and be roasted. From the roasting plant it would go into what we term the sulphide bins, each one getting its number. From the roasting bins it would be taken to the mix room, and mixed with other ores if we were treating other ores that day, if not, to be mixed with the different classes of coals which we used for reducing. From the mix room, it was loaded into what we termed charge cars, and carted into block houses, and in the morning it was charged into cylindrical retorts, and the zinc ore distilled and caught in condensers, from which it was drawn as spelter or liquid zinc—

The Master: He asked about the residues?

(Continuing:) After the molten zinc was drawn from the condensers, the condensers were taken off from the front of the retort, and everything remaining in the retort was scraped out and dropped below the main floor into cellar pans. All of the material remaining in the retort was called the residue. That was drawn out onto large residue piles, and allowed to remain in the pans until it cooled, at which time it was dumped, and the pans would be used again the next morning. After the mass had cooled, or a sufficient quantity had accumulated for shipment, it was loaded on particular cars and shipped out to either Chrome or the Leadville plant of the A. S. & R. Co.

Q. Will you state about how many men were employed at the Altoona plant?

A. I should say about 300 on an average; 330; something like that.

Q. About how many were employed at Iola?

A. Very close to the same number.

[fol. 551] Q. Did the majority of these men consist of ordinary laborers who were not hired for any specific time, or who did not remain with the company for any specific time?

A. They were all on day pay, except the superintendent and the yard man, the furnace foreman, and the office force were on monthly pay; practically all of the others were on day pay.

Q. And as the crude zinc ore was taken out of the original bins into which it was dumped, when it arrived at Altoona, it was passed from one process to another, and from the hands of one squad of laborers to that of another?

A. Correct.

Q. Were there any records kept at Kansas City to show the intermediate steps that this ore took as it was passed from the unloading bins into the roasting oven, or from the roasting oven to the sulphide bins?

A. No, sir.

Q. What records did you receive at Kansas City to indicate the amount of ore which was treated, and what particular lots that ore consisted of?

A. We received weight and moisture certificates which gave the weight of the car as weighed, and the moisture determination made from the sample taken at the time it was unloaded, and the dry weight, also the car numbers, and the lot numbers assigned to that particular car, and the bin into which it was placed.

Q. Did you receive any reports to show the way it was treated?

A. We received daily reports showing the ores that were treated in each furnace each day, and recovery made on each furnace.

Q. Did you receive any monthly reports summarizing it?

A. We received monthly reports showing the ores specified by lot, [fol. 552] and car numbers, treated during the month, and those remaining on hand at the end of the month.

Q. Do you know whether the data contained in these daily or monthly reports was entered into any book kept at Kansas City in the ordinary course of business?

A. The data from the monthly report was entered in the ore purchased and ore received books, showing the production used during the month, and the product still on hand.

Q. Will you state whether at any time you stopped the arrangement for paying the Mammoth Copper Mining Company for its residues in the manner which you have outlined?

A. Mr. Metcalf was complaining considerably about our delay in making returns for residues. Of course we disclaimed any responsibility; we were simply handling this for his account; and he wanted to adopt some system which would enable him to get returns quicker. I therefore advised the smelter at Altoona to make a cut-off, that is to finish the smelting of certain lots, and then make a report of the Kennett ores which had been smelted, so that we could ship all residues made from ore smelted up to that particular date, and from that time on we would not handle the residues for Mr. Metcalf's account, but we would figure out a basis which would be based on the gold, silver and copper contents of the ore as it came into the plant. That cut-off that I referred to was made the latter part of December, 1915, and all residues—

Q. (Interrupting.) Do you remember what date?

A. As near as I remember, it was about the 27th, but I don't think we smelted any more Kennett ore during that month. All residues

made from ore smelted up to that time were shipped for Mr. Metcalf's account, and he was paid the amount we received from the plant to which it was shipped, less 25 cents a ton for handling at our plant. On all ores that had not been smelted up to that time, the gold, silver, copper contents was accounted for on this new basis which I figured out. That new basis was based on the actual returns we had received from the Arkansas Valley plant for that product shipped them.

Q. In computing the basis upon which you were going to make payment to Mr. Metcalf after December, 1915, for his residues, did you attempt to leave the United States Smelting Company any margin of profit?

A. On the residues?

Q. On the residues?

A. The calculation I made showed a loss of two and one half cents a ton, which was immaterial.

Q. Was it your intention to give him as nearly as you could what he had been receiving before from the Arkansas Valley?

A. Yes, sir.

Q. At the time were there any lots of Kennett ore on hand which had been shipped prior to December, 1915, and received prior to that date to be smelted—prior to December, 1915, but which had not been smelted?

A. Yes.

Q. Was this new arrangement to apply to those lots of ore?

A. Yes.

Q. I show you Plaintiff's Exhibit 30—

The Master (interrupting): How did they preserve the identity of these residues after they were taken out of the furnace,—after the zinc had been taken out.

The Witness: Since you were smelting ores daily from the Kennett ores you could not preserve the identity.

[fol. 554] The Master: Of a particular carload.

The Witness: No, of a particular carload. You could, however, take a certain amount of Kennett—a certain number of carloads and smelt that ore, and after you got through you could have kept the residues in a pile by themselves and that is the only way you could preserve the identity of those residues.

Mr. Jerome: But did you do that?

The Witness: Up to the time we made the cut-off, the only identification was this, that all the residues we had made up to that time that we shipped were the Kennett residues from the lots that had been smelted during that period.

Mr. Jerome: Did you smelt any other zinc ores?

The Witness: A few cars of the Green Monster.

Mr. Jerome: Which was mixed with the Kennett.

The Witness: Yes.

Mr. Jerome: The residues were mixed with Green Monster.

The Witness: Yes.

Q. Prior to the time you made the cut off in December, 1915, about the 27th, when you were shipping the residues of the Kennett ore for account of the Mammoth Copper Mining Company, will you state how, when the Kennett ore was mixed with the ore from any other shipper and smelted together and the composite residue shipped how you arrived at any division by which you could pay the Mammoth Copper Company for its residues, and the other company for their residues?

A. I will have to tell you. The only ore we smelted with Kennett during that period mentioned was a few cars of Green Monster. The method we used in making that division was not a method which we would ordinarily have practiced. We did not have—we did not determine that there was residue value in Green Monster ore until sometime after we began to receive Green Monster ore,—when discovered that there was ten or twelve or fifteen ounces of silver in the ore, we commenced treating the Green Monster ore we had left with Kennett ore to recover the residue value, and not having any assay of the Green Monster in making division they took a mathematical—made it on a mathematical weight—made a mathematical division based on the weight of each ore.

The Master: They treated it all alike as to contents.

The Witness: They treated it all alike as to contents.

Mr. Jerome: You assumed the analyses of the Green Monster would be the same as the analyses of the Kennett.

The Witness: We assumed that the recovery values would be approximately the same.

The Master: Just how did you arrive at the results of the Green Monster?

The Witness: By weight.

Q. Did you buy this Green Monster ore outright or was there any provision—

[fol. 556] A. We bought it outright. We did not account to the shipper for any residue in that.

Q. When you smelted the Kennett crude ore, did you mix it with any other ores, besides the Green Monster?

A. Not during this period,—up to the cut off.

Q. So when you smelted Kennett crude ore it preserved its identity as Kennett, and all residues preserved from such smelting was Kennett?

A. Yes.

Q. And all these residues were shipped?

A. Yes.

The Master: Were those residues mixed with any Green Monster?

The Witness: Yes, some of them were.

Q. In cases where the residues of Green Monster ore were mixed with the residues from Kennett ore from what source did you obtain the information as to the amount of Green Monster that had been smelted with the Kennett ores?

A. We had certain bins containing certain carloads of Green Monster ore. After cleaning up a bin we would know how many

cars, and what cars had gone into the mixture. We would also know what Kennett ore had gone into the mixture by taking the ore from certain bins.

Q. Would the smelter reports show the amount of Green Monster ore that had been smeltered at the same time the Kennett ore was smeltered?

A. Yes.

Q. It would show the weight?

A. Yes.

Q. And when you made that division in order to ascertain the amount due the Mammoth Copper Mining Company you divided it on the basis of those weights?

A. In this instance, yes.

[fol. 557] Q. Will you state whether it is possible to give an approximation as to what the average assay of the Green Monster ore was?

Mr. Jerome: I object to his asking whether it is possible. Ask him can he under oath give it?

Q. Can you under oath give what would be an accurate average assay of the residue values of *the residue values* of the Green Monster ore?

A. Some cars of Green Monster ore subsequently assayed received at Iola and Altoona assayed all the way from four ounces to thirteen ounces silver. Ores—or ore—vary so that it would be impossible to tell what the particular assay was on the ores going into this mixture.

Q. How much silver did the Kennett ore assay?

A. Eight to ten ounces.

The Master:

Q. Do your records show what weight was the Green Monster ore that went with these Kennett residues?

The Witness: Yes.

The Master: Is it an insignificant quantity; have you informed yourself on that?

Mr. Stockton: It was pretty nearly insignificant. The total amount would only be five or six hundred dollars. Mr. Metcalf, do you know?

Mr. Metcalf: Something like that.

[fol. 558] Q. I show you two sheets in Plaintiff's Exhibit 30, headed "Residue settlements." Will you state what the sheet that is on the extreme left hand side of the page, what the word "Iola" represents?

A. Represents those residues were made at Iola.

Q. And does that represent the settlement to the Mammoth Copper Mining Company for the residue values of the zinc ore shipped to Iola?

A. Yes, sir.

Q. And what does the page that has the word "Altoona" on the extreme left represent?

A. It represents certain ores received at Altoona from the Mammoth Copper Company on which we made settlements for gold, silver and copper direct without smelting them, and returning the residues.

Q. Do you know from what sources this statement as to the residue settlements—this statement as to the residue settlements for certain lots of Mammoth ore was made up?

A. I did not make it up. I don't know. I would assume that it was from the ore purchased or ore received book.

Q. Will you state whether you have checked the shipment lot numbers appearing under the column lot number on this settlement with the shippers' lot numbers appearing on the January 1, inventory in the ore purchased book?

A. Yes.

Q. Does the ore purchased book show that the shipment lot numbers shown in this residue settlement which had been shipped up to December 27th, 1915, were on hand at that time?

A. On hand, or received later.

Q. Did you continue to ship to the American Smelting & Refining Company the residue of the Kennett ore?

A. Yes, sir.

Q. After December, 1915?

A. Yes.

[fol. 559] Q. And did you continue to receive payments from them upon the same terms?

A. Yes.

Q. And have you found as a matter of fact that you paid Kennett more for those residues than you received from the American Smelting, Refining & Mining Company?

A. I am not prepared to say. I don't remember how many dollars we received, more or less, than we paid Kennett over any particular period.

Q. You stated the figures you gave Kennett were two and a half cents per ton more, did you?

A. That was based on the amount we had received on ore shipped prior to December 27th, 1915.

Q. Will you state how you arrived at the terms of the agreement made between you and the Mammoth Copper Mining Company as set forth in your letter of March 8th and March 20th, 1916, to Mr. G. W. Metcalf?

A. I took the amount of money that we had received from the Arkansas Valley plant for residues from certain shipments of Mammoth Ore, and I figured out—and also the metal content of the residues. I had the assays of the gold, silver and copper of the original ore which went to make up these residues, and I figured the percentage of recoveries of gold, silver and copper which the smelter had made in the treatment of the ore in the form of residues. That gave me the sixty-five per cent gold, sixty-five per cent silver, and the sixty per cent copper—of the dry assay of the copper mentioned in these

letters. After applying those percentages, against the gold, silver and copper assay of the crude ore at the price we received from the A. S. R. for those metals, I then deducted the difference—I deducted the amount we received from the A. S. & R. from the total value [fol. 560] of the metals, and that gave me the amount I had to cover by freight and treatment charge and that amounted to 3.875 cents, and I made the treatment charge 3.85, figuring that there might be some little minor variations in our recoveries or assays. That was as near as one could get at it.

Mr. Jerome: In other words the original contract between the U. S. Smelting Company and Mammoth in regard to these ores was modified in this letter of March 8th?

The Witness: Yes.

Mr. Jerome: Along the lines you just testified to.

The Witness: Yes.

Q. Mr. Eardley I show you Plaintiff's Exhibit 106—1 to 106-20 and call your attention to the ore settlement sheets of the American Smelting & Refining Company contained in those exhibits and ask you if you remember having seen those sheets before?

A. Yes.

Q. Did you receive any checks or vouchers with those sheets?

A. Yes.

Q. Did you compare the amount of the checks with the amount shown on the settlement sheet?

A. The office did; I did not always do it.

Q. Can you testify that the United States Smelting Company received from the American Smelting & Refining Company the amount shown—the total of the amounts shown on Plaintiff's Exhibit 30 for the shipments headed "To Arkansas Valley"?

A. I have not checked these over but if these were the amounts appearing on the settlement sheets I can.

[fol. 561] Mr. Jerome: Of your own knowledge.

The Witness: Yes, that it came to my office.

Q. You can swear you received the amounts which the settlement sheets totaled?

A. Yes.

Q. Did you make every effort to, did you do your best to secure the most favorable price for the ore residues which were shipped?

A. I certainly did.

Q. On behalf of the Mammoth Copper Mining Company?

A. Yes, sir.

Q. In the case of the residues which were shipped to Chrome, New Jersey, will you state how payment was made, if you know?

A. I think that was made by credit sent to Boston.

Q. I call your attention to the settlement sheets for the ore sent to Chrome, New Jersey, bearing the heading "L. Vogelstein & Company"—

A. (Interrupting.) Vogelstein & Company had an arrangement with the United States Metals Refining Company for the purchase of

ores and the sale of metal. Ore settlements always appeared on the Vogelstein letter heads, as did the sale of metal at times.

The Master: The United States Metals Refining Company, did it have its works at Chrome?

The Witness: Yes.

A. (Continuing:) That was partly owned by L. Vogelstein & Company, and they had an arrangement made at the time the U. S. Metals Refining Co. bought into that concern to buy the ores for them and to sell the metal produced at the plant.

[fol. 562] Q. Settlement sheets for ores sent to Chrome would be on the letterhead of L. Vogelstein & Company?

A. Yes, sir.

Q. Did you make any effort to locate the Chemist Thurston?

A. Yes, sir.

Q. What effort did you make?

A. I called up Mr. Rankin, who was the last superintendent at Altoona, to see if he knew where the gentleman was, and I also wrote Mr. Campbell down in Louisiana, who was the last manager, to see if he knew where he was, and I also took it up with Mr. Rankin's father, who was down at Blackwell. I could not find any clues. They did not know where he was.

Q. Did you make any effort to find out the whereabouts of Benus Swirski?

A. Yes, sir.

Q. And C. H. Dewitt?

A. Yes.

Q. What efforts did you make?

A. With respect to Swirski, who was at Iola, I talked with Mr. J. B. Kirk, who now owns the Iola plant, and from him—he originally purchased the plant, and he knew everybody in Iola; also with Mr. Curtis, who was formerly in charge of the laboratory at Iola, and they could not tell me where he was, neither Mr. Rankin. I also asked him about Swirski.

Q. And how about Dewitt?

A. I received a letter from some railroad company in Chicago, or rather, from some bonding company, saying that Dewitt had applied for a bond, and just at that time I received a letter from Mr. Metcalf asking me if I could locate him, and I secured from this bonding company his supposed address and conveyed it to Mr. Metcalf.

Q. Can you state whether there were any records kept at the local plant offices at Iola and Altoona in which all the data relating to the [fol. 563] various lots of ore handled at those plants were assembled together?

A. No, I don't know of any.

Q. Was it the scheme of the organization which you had under you, that the chemists at Iola and Altoona, and the weighmasters at those points should forward through the local offices the results of their work to the main office at Kansas City, and that all the book-

keeping for the United States Smelting Company operations should be done at Kansas City?

A. All permanent records were kept at Kansas City; that we considered permanent.

Q. Were any references made to the local records of the plants at Iola and Altoona in charging customers, or in paying customers for the ore received?

A. No, sir.

Q. You depended exclusively upon the Kansas City records?

A. Yes, sir.

Q. And those records were the ore purchased book and the ore received book which are in evidence here?

A. Those are two of them.

Q. And other financial books in the accounting department?

A. Yes, sir.

Q. Now, will you state whether you made any efforts at the time of the first breach of the contract by Beer, Sondheimer & Company to obtain a market for that ore on behalf of the Mammoth Copper Mining Company?

A. Yes, I did.

Q. Will you state just what you did?

A. We received a telegram in Salt Lake from W. F. Moore, who represented the Mammoth Copper Mining Company at Bartlesville, that they had refused to accept any more ores, and that, I think, a large number of cars had arrived, something like nineteen had been [fol. 564] rejected; that was April 20, 1915. About May 3 or 4, I left Salt Lake and went to Denver.

Q. Excuse me, at that time, what was your position?

A. I was Ore Purchasing Agent for the United States Smelting Company. On May 3 or 4 I left Salt Lake and went to Denver to see the American Metal Company, to see if I could arrange with them to handle this Kennett ore. Mr. Schott, after one or two days' negotiations, advised me that it would be impossible to arrive at any conclusion there, that I would have to go on to New York.

The Master: Did Mr. Schott have some official relation with the American Metal Company.

The Witness: He was the manager of the American Metal Company in Denver.

A. (Continuing:) I went on to Kansas City to see Mr. Geo. E. Nicholson, who was operating the Altoona plant. Mr. Nicholson was in California. I went down to Iola, Kansas, to see Mr. J. B. Kirke, who had started up the Iola zinc plant. Mr. Kirke had no roasters, and could not handle any sulphide ores; so I went from Iola, Kansas, down to Los Angeles to run down Mr. Nicholson. I met Mr. Nicholson there, and he advised me that he could not use the ore for three reasons, one was that he was handling no product with residue values, and was not prepared to handle that class of product. The second one was that he did not want to handle crude ore that had to be crushed, because he did not have the crushing

facilities. The third was that he had all the ore he needed at that [fol. 565] particular time, and Joplin could be bought cheap and he did not care to enter into an agreement to purchase. From Los Angeles I went to Salt Lake, and I met Mr. Schott there on May 20, 1915. He could do nothing for me so I went on from Salt Lake to St. Louis and I saw the Granby Mining — Smelting Company, a Mr. Gatch, who was the head of that company, who advised me he was entirely filled up, and would not make any offer under any conditions. I saw the Edgar Zinc Company at St. Louis, and he advised me that they were entirely filled up, and not in a position to handle any more sulphide ores. I then went on to New York, and while here I took up the question again with the American Metal Company. At that time they had a contract with the,—The Needles Mining & Smelting Company, had a contract with the American Metals Company for the treatment, as I remember, of twelve hundred tons a month. They wanted to decrease the shipment of Needles in the event they took any Kennett. After negotiation with Dr. Sussman and Mr. Putzel for a couple of days,—I was unable to get any proposition that they would stand on. They would talk about one proposition in the morning, and if I accepted it they would say to come back in the afternoon and we would close that up, and when I went back in the afternoon they thought of several other excuses for not closing and would have some other modifications to propose, and it went on that way for two or three days, and I simply got disgusted at not being able to arrive at any conclusion at all. All the propositions made were based on decreasing shipments under two other contracts which they had,—

[fol. 566] Mr. Jerome: With whom?

The Witness: One with the United States Smelting Company and the other with The Needles Mining and Smelting Company.

Mr. Jerome: And by whom was the Needles Company controlled?

The Witness: The Needles Company was controlled by the United States Smelting, Refining & Mining Company.

The Master: Just as the United States Smelting Company was.

The Witness: Yes, another subsidiary.

A. (Continuing:) I then saw Mr. Elkan, and he made a proposition which I—

Q. Whom did Mr. Elkan represent?

A. Beer, Sondheimer & Company, the defendants in this case. And he made a proposition which I transmitted to Salt Lake, but it was not accepted. I then went to Boston to see Mr. Sharp, the President of the United States Smelting, Refining & Mining Company. I advised him that I had been in touch with every zinc smelting company handling sulphide ores, and found it absolutely impossible to market the Kennett product and that the proposition made by Beer, Sondheimer & Company was not satisfactory. Mr. Sharp,—that constitutes the effort I made to sell Kennett ore at the final breach.

Mr. Jerome: Will you state who Mr. Sharp was?

The Witness: He was the President of the United States Smelting, Refining and Mining Company.

[fol. 567] Q. At that time how long had you been employed by the United States Smelting Company as ore salesman?

A. As Purchasing Agent?

Q. As Ore Purchasing Agent?

A. Seven years.

Q. Did your duties have anything to do with the sale of ore?

A. Yes, I sold all the ore that the United States Smelting Company sold, and I think that the Mammoth Copper Company sold.

Q. Was it part of your duties to become acquainted with the various sources of demand for the various kinds of ore produced by the Mammoth Copper Mining Company, the United States Smelting Company and other companies?

A. I consider I was in as direct touch as any other person relative to the markets for ores.

Q. Did you make an effort at every source known to you which there might be, at which you could,—where you could dispose of the Mammoth ore?

A. Yes.

Q. Were you able to secure a bid from any source?

A. I received no firm bid from any source except Beer, Sondheimer & Company, the defendants in this case.

Q. Were you familiar with what you might call the zinc crude ore market at this time?

A. Yes.

Q. Can you explain the condition of the market at this time?

A. This was in May, 1915?

Q. Yes.

A. I could follow it pretty well through the fluctuations in the price for spelter.

Q. Explain whether or not the market for zinc crude ore was full of ore or was it hard to get?

A. There was a plentiful supply of ores. All of the smelters were filled up, as I indicated in a previous answer.

Q. Can you explain what caused this unusual price?

[fol. 568] A. The rise in the price of spelter impelled almost everyone having a zinc mine or a zinc dump, to start the operation of that mine or commence the shipping of that dump as the price of spelter was high enough to enable them to ship ore at a profit which previously could not have been shipped at a profit.

Q. Will you state what had been the average price of spelter during the two years preceeding this period, during 1913, and 1914?

A. The price during 1913, and up to August, 1914, was around five cents, or a little under,—

The Master: At the pound?

The Witness: Five cents a pound.

Q. Can you trace the course of the spelter market thereafter,—I will withdraw that question.

Q. At what time did you remove your office to Kansas City and become manager of the United States Smelting Company?

A. June, 1915.

Q. You made your agreement with the Mammoth Copper Mining Company to take their ores in July, 1915?

A. Yes.

Q. About what was the capacity of the Altoona and Iola plants?

A. At the time we took over the Altoona plant, around the first of July, 1915, it had five blocks with a capacity of approximately twenty five hundred tons a month. In August, 1915, we built another block, making our capacity three thousand tons per month. Later on, beyond the period involved in the suit, we built additions, —

Q. I only mean at this period?

A. At Iola, when we took over the plant on July 2, 1915, there [fol. 569] were four blocks with a capacity of two thousand tons per month, and in August, 1915, we built another block giving a capacity of twenty five hundred tons per month.

Q. Making a total capacity in August of —

A. (Interrupting.) Fifty five hundred for Altoona and Iola.

Q. Do you remember at what rate you received shipments from the Mammoth Copper Mining Company?

A. As I recall, it was approximately a thousand tons per month.

Q. Were you running at capacity from August, 1915, on?

A. Yes, always.

Q. Were you in touch with the crude zinc ore market all during the year, 1915 and 1916?

A. Yes.

Q. If you had been receiving no Mammoth crude zinc ore, can you state whether or not you could have secured ore of equal grade to replace it?

A. Without any question.

Q. Could you have obtained it at approximately the same price which you paid for the Mammoth ore?

A. Yes.

Q. You are sure of that?

A. Yes.

The Master: By approximately, do you mean as low a price or possibly a higher price?

Mr. Stockton: At approximately the same or a lower price.

The Witness: I have in mind in making that answer that we could buy it at a price which would yield the United States Smelting Company just as large a profit as, after all, it was all to be taken at a price based on the profit we could make.

[fol. 570] Mr. Jerome: You did not consider the market value of the ores, then, at all?

The Witness: What do you mean?

Mr. Jerome: What you could go out and buy the ore in the market for, for example.

The Witness: We had to pay the market value.

The Master: You say you could have bought such ore as came from Kennett at as low a price in the open market as you paid for it under your arrangement with that company.

The Witness: Yes.

Q. As a matter of fact, can you state whether you had offered to you ore of a grade equal to the Kennett zinc ore which you were compelled to refuse because your capacity was all taken up by the kennett ore?

A. We refused lots of ore during 1915.

The Master: For that reason.

The Witness: For the reason that we were filled up, could not handle any additional ores.

Q. Was the volume of this ore which you refused equal to the amount of Kennett ore which you received?

A. During that period?

Q. Yes.

A. Yes, much in excess.

Q. Can you state what the general system was for keeping a record of the ores received at the various zinc smelters of the United States Smelting Company, and accounting for them to the shippers?

A. In a general way.

[fol. 571] Q. Yes, in a general way.

A. When the ore was received at the plant it was weighed, and the weight registered automatically on what was termed the scale tickets. After the car was unloaded, the car was weighed light, and the same ticket used and the tare weight automatically punched directly under the gross weight. The scale man would then make a deduction of the tare weight from the gross weight, to arrive at the net weight, and he would also enter it in a book that he had—I refer particularly now to Altoona—and the book and the scale ticket would go to the office at Altoona, from which they would make up the weight certificate. After the ore was assayed and moisture determined in the laboratory, they would make out a daily laboratory report, which would also go to the Altoona office, and the moisture noted in this weight certificate, and the amount in pounds calculated and a deduction made to arrive at the dry weight. They would also note on the weight and moisture certificates the date the car arrived at the Altoona station,—the day it arrived at the Altoona plant, the date unloaded, the bin into which it was unloaded and that weight certificate with that information,—also with the car number—and the laboratory report would go to the Kansas City office. Those reports would come to me. I would also receive assay certificates, or rather laboratory reports from the other smelters, which we were operating to arrive at the settlement assay, which was attached to the weight certificate and sent into the ore department and they would make up the ore settlements from that data in addition to the usual,—to the [fol. 572] contracts which they had on hand there to determine the metal prices, and the dates of quotations et cetera.

The Master: You said you would arrive at the settlement assay. Just what did you mean by that. What would you do to arrive at the settlement assay when you had these figures before you?

The Witness: I would get an assay from the Altoona plant and also one from the Iola plant.

The Master: You mean by settlement, an Iola report from the Iola plant of the same ore that had gone to the Altoona plant.

The Witness: Yes, on the same car that went to the Altoona plant. I would probably have compared a great number of other assays made by Denver chemists, New York chemists and Salt Lake chemists with the work of the Altoona plant and the Iola plant, and would know in a general way as to the tendency of each laboratory,—whether it was constantly running low or constantly running high, and I would also have the assay of the Mammoth Copper Mining Company, and having before me the Altoona assay, the Iola assay, the Mammoth assay and a comparison of the work shown by each laboratory, I would arrive at an assay which in my opinion reflected the true content of the ore. Sometimes it was the highest, sometimes it was the lowest, sometimes it was somewhere in between.

The Master: These assays from Iola, the Mammoth Copper Mining Company and the Altoona plant, would all be assays on the same shipment of ore?

The Witness: Yes.

The Master: The assays you had from other laboratories simply affected your general knowledge on the subject, didn't refer to the same ore.

The Witness: Yes—

Q. (Interrupting.) At the same time you received assay reports covering Kennett ore were you also receiving assay reports from the Altoona and Iola laboratories covering other ores, being treated at the same time the Kennett ore was being treated?

A. Yes.

Q. And would some of those assays be compared with the shipper's assays by you daily?

A. Yes.

Q. Was it as a result of your comparisons of those assays that you found at times one laboratory would run regularly higher in its assay than the other laboratory would,—than the shippers' or umpires' laboratories would run?

A. Yes, sir.

The Master: Do you mean by that question to confine him to assays of this actual ore from Kennett?

Mr. Stockton: No, sir. To the assays being made generally at those offices on zinc ores.

Q. Can you state how far your conclusions, in arriving at the settlement assay on a Kennett ore was influenced by the knowledge you gained from the assay and checked assays submitted to you on other lots of ore being treated at Altoona?

[fol. 574] The Master: Not coming from Kennett?
Mr. Stockton: Not coming from Kennett?

A. If I found that the Altoona laboratory was constantly showing higher results than obtained from a half dozen other laboratories, I would assume that they were wrong, and the majority were in the right, and I would then give more weight to the Iola assay than I would give to the Altoona assay and the settlement assay would conform more nearly to the Iola assay. Likewise, if the Iola assays were at a certain time running constantly higher than generally other chemists, I would give more weight to the Altoona assays.

The Master: What is that Was that to get the lowest?

The Witness: No, sir, I tried to arrive at what I, in my opinion, thought was the fairest assay which represented the true content of ore.

Q. Mr. Eardley, when you arrived at an assay figure for the settlement assay on Kennett ore, from what figures were you working?

A. From the assay report by Altoona and Iola on the Kennett ore.

Q. Did you take into consideration in altering those assays to a certain extent, the general run of the Altoona and Iola laboratories, as to whether they were assaying higher or lower on all zinc ores at that time?

A. That had an influence on the results, but I used the Altoona and Iola assays as a basis of arriving at my calculation.

[fol. 575] Q. These smelters were only zinc smelters, weren't they?

A. Yes.

Q. And you were only handling zinc ores?

A. Yes.

Q. And did you find an assay at some time of one laboratory or another, at Altoona or Iola, to run higher than other laboratories making assays of samples drawn from the same lot?

A. Laboratories would often get off. Their solutions are not always properly standardized.

Q. Will you pick a typical case and explain how you arrived at that assay, Mr. Eardley, just give an illustration?

A. For example, I would receive an assay from Iola on a car of Kennett ore, which according to the Iola assay ran forty per cent zinc. I would get an assay from the Altoona laboratory—

Q. (Interrupting.) On what ore?

A. On the same car, and the assay was forty-one per cent zinc. Now, during the same time the Iola or the Altoona laboratory would assay a lot of Butte and Superior and a lot of ores from other mines. Each one of those other ores were assayed by a different chemist. One in Salt Lake, one in Denver and one in New York, and—

Q. (Interrupting.) As well as by the Altoona laboratory?

A. As well as by the Altoona laboratory. I would have made a comparison between these various other laboratories on these various other ores and the Altoona assay on these various other ores. If in every case these other assays were one per cent lower approximately, than the Altoona assay, it would convince me that where

there were a half a dozen or more lower than Kennett,—or than [fol. 576] Altoona on the same ores, that Altoona must be high, and I would therefore probably settle on the Iola assay or very near to it.

The Master: That is to say, you would make some deduction in such a case as you put; you would make some deduction from the actual Altoona assay?

The Witness: I would not take an exact split between the Altoona and Iola; neither the Iola or,—I took somewhere in between the two.

The Master: But you would act upon assays of the plants on the precise ore which was involved in the settlement sheet. You would act upon the Iola assay and the Altoona assay on the particular ore that was included in the settlement sheet.

The Witness: Always.

The Master: You used this information that you got that you have described in your answer here, to determine whether you should take some one of the actual assays of the Kennett ore, or make a division between them.

The Witness: Yes.

Q. Can you state whether you pursued this practice with reference to other shippers?

A. Yes.

Q. Can you name some of those shippers?

Mr. Jerome: Objected to as irrelevant.

Objection sustained. Exception.

Q. Was it your endeavor to use for settlement assays what, in [fol. 577] your opinion, represented the true and the nearest to the correct assay of the ore in question as gained from all the sources of information which were available to you?

A. Yes.

The Master: Did you ever make the assay used for your settlement sheet so that it showed a greater percentage of zinc than one of the actual assays of the ore which was included in the settlement sheet?

The Witness: I don't think there is one case of that kind.

Mr. Jerome: Where the zinc content was lower than the chemist's reports showed.

The Witness: No, sir. I said it was never higher as far as I knew.

The Master: He said it was never higher than one of the actual assays of the ore in question, as I understand it.

The Witness: Yes.

Q. I wish you would refresh your recollection on one point, that is as to whether you had the Mammoth Copper Mining Company assays before you at the time on the Kennett sample?

A. On the Kennett sample, yes.

Q. Mr. Eardley, you stated that in the spring of 1915, the price of spelter began to increase enormously and this brought out a large

supply of zinc ore. Do you know of any other causes which contributed to the excess supply of crude zinc ore in the country at that time?

A. Yes, the Australian ore up to the beginning of the war had been smeltered in Germany, as had also a large tonnage of Spanish ore. When the war started, the outlet for this ore was cut off, and [fol. 578] they had to find other markets and they sent to this country to be marketed—the Australian ore, the Spanish ore, and Algerian ores in large quantities.

Q. Have you any idea as to the amount of such ores introduced into this country at that time?

A. Yes, in 1915, for example, before the war, prior to 1915, the total amount of imported ores to this country was approximately thirty thousand tons per year, twenty-five to forty thousand tons. During the year 1915, there were one hundred and fifty-nine thousand tons of ore imported. In 1916, almost four hundred thousand tons of ore were imported to this country.

Q. Were there ores coming in from any other countries besides these countries in large quantities?

A. Yes, there was ore coming in from Mexico, which prior to the war had only imported to this country around twenty-five thousand tons of ore and in 1915,—around twenty-five to thirty-five thousand tons of ore, and in 1915, they doubled their imports to around sixty thousand tons.

The Master: You mean that the United States doubled its imports from Mexico?

The Witness: Mexico doubled its imports to the United States.

The Master: You mean exported to the States.

The Witness: Exported to the United *United* States.

A. And in 1916 exported to this country over one hundred and sixty thousand tons. So that these enormous tonnages, coming in from various countries, it made the ore market free and it was possible to secure large tonnages of ore at very favorable prices. As [fol. 579] I recall there were also ores from China and Japan at that time.

Q. Was it part of your duties to be familiar with the zinc smelting demand of the country and the total smelting capacity of the United States?

A. It was.

Q. Can you state whether those offerings of ore exceeded the capacity of the smelters of the United States?

A. Yes, sir.

Q. Do you know about when the influx of these ores commenced?

A. In the spring of 1915.

Q. And during what period, at what time would you say the capacity of the American Zinc had become completely filled up?

A. I could not state that.

Q. Do you know whether any zinc, foreign zinc ore, had started to be—to actually be—brought into the country in June and July, 1915?

A. Yes. Australian ore started coming in in June, 1915.

Q. In considerable quantities?

A. Yes.

Q. Can you state whether there is any advantage, from the zinc smelters standpoint of view in buying crude lump zinc ore as against zinc concentrates?

A. I would say there was a disadvantage.

Q. Do you include in your answer concentrates realized by flotation methods?

A. No, I had in mind the jig and table concentrates.

Q. Can you state what difference there is between jig and table concentrates and flotation concentrates, which makes the latter more undesirable from a smelter's standpoint of view?

A. The difference between—flotation concentrates are exceedingly fine, probably 200 mesh. Jig and table concentrates are much coarser, [fol. 580] jig concentrates often being as coarse as a quarter of an inch, and in handling crude sulphide ores you have to crush the crude ore down to a concentrated size in order to roast it before you can use it in any way, so that there would not be any advantage in buying ore you had to crush to a fineness in preference to an ore already crushed to that fineness.

Q. Would there be any reason so far as smelters are concerned for paying more for the crude zinc ore than there would be for a concentrated zinc ore—excepting flotation concentrates?

A. No, sir.

Q. So that any quotation that was made for concentrates would not be any lower than the quotation that would be made for crude zinc ore of a similar character?

A. No, sir.

Q. In the case of United States Smelting Company was there any advantage to the smelter, so far as the zinc was concerned, in buying ores which had residue values?

A. No, sir.

Q. You did not realize a larger percentage of zinc because of the residue values?

A. No, sir.

Q. And there was no object in paying more for the zinc in the ore because of the presence of residue values?

A. No, sir, not where we paid for the residue as well.

Q. Can you remember what the average silica and iron content of the Kennett ore was?

A. I know approximately, I should say that the iron content was seven or eight per cent. and the insoluble eighteen or twenty per cent.

The Master: I suppose insoluble is what you designate as silica?

Q. By insoluble do you mean what I spoke of as silica?

[fol. 581] A. We made no assays for absolute silica. We made an assay for insoluble which included the silica.

Q. Can you state whether there would have been any reason for

your paying more for zinc ores running as high in iron and silica as the Kennett ore than you would have paid for the ore that did not average so high in iron and silica?

A. No, there would not be any difference particularly.

Q. Would you have paid more for the ore or concentrates containing the same percentage of zinc as the Kennett ore than you did pay for the crude zinc ore from the Kennett mine?

Mr. Jerome: I think that is objectionable—what he would have done. He has testified that it made no difference in the price they paid the Mammoth Copper Mining Company—the price paid for crude ore as against concentrates.

The Master: You mean that you paid as much for the crude Kennett ore as you actually did pay for the concentrates of the same ore?

The Witness: Yes.

By the Master:

Q. Yet the concentrates were worth more to the smelter, were they not?

The Witness: The only difference was the cost of crushing.

The Master: You had less trouble in handling the concentrates to some extent than you had in handling crude ore?

The Witness: Yes.

[fol. 582] The Master: A certain part of the work was already done on the concentrates?

The Witness: Yes.

Q. At the time you made this contract with the Mammoth Copper Mining Company did you consider that you were assuming a considerable risk, although you named an eleven cents maximum spelter price?

Mr. Jerome: Objected to. He calls for a conclusion that anybody can draw in answer to that; it is mere speculation.

The Master: When you say "Do you consider," do you mean to draw out the fact that there was a considerable risk of the price of zinc, according to the market going away down?

Mr. Stockton: Yes.

Discussion off the record.

Objection withdrawn by Mr. Jerome.

A. Yes, sir.

Q. When you made a contract with a shipper for a purchase of zinc ore, what was the controlling factor that influenced you in making that contract?

A. The net profit we would make per ton.

Mr. Jerome: Objected to. I don't think that is direct examination.

The Master: Allowed. I think you are drawing out here matters that are really not expert testimony.

Q. Just state in a hypothetical case the way in which you arrived at the terms which you would offer to a shipper for a certain kind of [fol. 583] zinc—running a certain percentage of zinc?

A. I would proceed to find out how much the smelting margin in that particular ore would be.

Q. What do you mean by smelting margin?

A. I mean the amount that the smelter would have to cover the cost of smelting, the cost of freight to East St. Louis, selling commission and profits. That constituted what we termed the smelting margin after paying for the ore.

Q. Do you know what was done with the laboratory sheets that were sent in by Altoona and Iola to your office?

A. They were always placed on file.

Q. Were any of them ever destroyed to your knowledge?

A. Not to my knowledge.

Q. Did you give any instructions to destroy them to anyone?

A. No, sir.

Q. Did you handle the accounts of the Mammoth Copper Mining Company in a different manner from the way you handled the accounts of other shippers?

A. No, sir.

Q. Did you ever tell any of your laboratories to raise or lower assays submitted by them?

A. No, sir.

Q. Whether on Mammoth ore or any other ore?

A. No, sir.

Q. Did you at any time make entries in the Ore received book?

A. Yes, occasionally.

Q. I show you Plaintiff's Exhibit 13-f, and ask you if there are any entries on that sheet in your handwriting?

A. Yes, sir.

Q. Have you enclosed those entries in green ink?

A. Yes, sir.

[fol. 584] Q. Can you state whether or not those entries were made,—from what sources those entries were made upon Plaintiff's Exhibit 13-f?

A. From the railroad bill of lading.

Q. Mr. Eardley, will you state whether there was any rule in force by you at Altoona and Iola with reference to the determination of a minimum moisture?

A. Yes, I think there was.

Q. Can you state what it was?

A. One per cent.

Q. Explain a little more fully what you mean?

A. If any ores were received at the plant which, under the ordinary method of determining moistures, contained less than one per cent, a minimum of one per cent was applied.

Mr. Stockton: That is all.

Cross-examination by Mr. Jerome:

Q. Are you a chemist?

A. No, sir.

Q. Or an assayist?

A. No, sir.

Q. Have you had any technical scientific training?

A. I have studied chemistry.

Q. Have you ever made a quantitative analysis in your life?

A. No, sir.

Q. Can you make one?

A. I don't know.

Q. Did you ever try to make one?

A. No, sir.

Q. Did you ever actually make a quantitative assay?

A. No, sir.

Q. Calling your attention to Plaintiff's Exhibit 23, you will see that annexed to that are what has been testified to as settlement sheets, as I understand it, between the United States Smelting Company and the Mammoth Copper Mining Company of ores shipped from Kennett to Altoona or Iola which otherwise would have gone to [fol. 585] Beer, Sondheimer had there not been a repudiation of the contract?

A. I don't get that question. I see some settlement sheets covering such shipments.

Q. Calling your attention, for the purpose of illustration, to one of these settlement sheets, being lot 51, you will notice that the United States Smelting Company under the heading "Per cent, zinc," their assay was 41.9 of zinc; that the shipper's assay, which means from Kennett, was 40.9 zinc, and that the settlement assay is 41.9 per cent of zinc, a per cent higher than the shipper's analysis. Every increase made by the United States Smelting Company, or every excess of zinc content shown by the U. S. Smelting Company's analysis, when that was used as the basis of settlement, above the shipper's analysis, that is Kennett analysis, redounded to increase the damage against Beer, Sondheimer, did it not?

A. I don't know whether this assay is the shipper's assay of the Kennett sample or Altoona sample.

Mr. Stockton: I object to the question.

(Question read.)

The Master: Objection overruled.

Mr. Stockton: Exception.

The Witness (continuing): I would have to figure that out.

The Master: You say it is not necessarily so?

The Witness: I cannot say offhand.

Q. In this particular sheet to which I am calling your attention, the assay of the United States Smelting Company showed a zinc content one per cent greater than the Kennett assay showed, did it not?

A. Yes.

[fol. 586] Q. And the Beer, Sondheimer contract depended upon as far as zinc was concerned on the quantity of zinc, didn't it?

A. They were both based on forty per cent.

Q. The more zinc in any particular ore shipped from the Mammoth that Beer, Sondheimer did not take, didn't that enhance the payment that Beer, Sondheimer had to make?

A. I don't know if it would or not. The spelter price does not enter into the quantity price there. In one case the contract was nineteen dollars for forty per cent, in the other case, eighteen dollars for forty per cent. In once case the variation in price was one dollar; in the other, one dollar and a half; so that where the assay was above forty per cent zinc, an increased assay would enhance the value; but I think where it is under forty per cent that is not true.

Q. Then take forty per cent?

A. In this particular illustration, yes.

Q. The more zinc content shown by the assay, the more spelter was recovered?

A. Recovery did not enter into either contract.

Q. I am not asking you that?

The Master: He asks you whether the higher the per cent of zinc in ore the greater the amount of spelter you would get out of it.

The Witness: The greater amount of spelter, yes.

Q. And the more spelter there was the more Beer, Sondheimer had to pay for it, didn't they?

A. If it was over forty per cent.

[fol. 587] Q. If it was below forty—the more spelter there was—they had to pay on a spelter basis, didn't they?

A. Yes, so did the United States Smelting Company.

Q. So, the more spelter there was, the more money Beer, Sondheimer had to pay for the ore?

A. Yes.

Q. Under the Beer, Sondheimer contract,—you executed that, didn't you?

A. No.

Q. You were cognizant of the terms of it?

A. Yes, sir.

Q. In the Beer, Sondheimer contract, irrespective of what the metal market might be, the greater the amount of spelter recovered from the ore, the great amount of money Beer, Sondheimer had to pay, isn't that right?

A. That is not treating the case properly. The contract was not based on the recovery. It was based on the zinc contents irrespective of the recovery.

Q. But the more zinc content the greater the recovery would be?

A. In per cent. no, in pounds of spelter, yes; not in percentage.

Q. And the more zinc that was recovered the more money Beer, Sondheimer would have to pay?

A. Not zinc recovered; the more zinc content in the ore.

Q. The more zinc content in the ore, the more money they would have to pay?

A. Yes.

Q. In these settlement sheets in this Exhibit 23 where it speaks of shipper's assays, it means the assay made at Kennett, does it not?

A. I don't know. I did not make up those settlement sheets.

The Master: Naturally, what would shipper's assays mean, if it did not mean an assay made by the shipper?

[fol. 588] The Witness: Those are not,—I don't know what that particular assay represents, Mr. Metcalf probably does.

The Master: Don't you know what assay was commonly entered under the heading "Shipper's assay"?

The Witness: Commonly so, yes.

The Master: What would it be?

The Witness: Usually it is the shipper's assay on the smelter pulp at which it was treated. That does not follow in the case of these Kennett assays.

Q. Why doesn't it follow?

A. We never used the Kennett assay in making calculations; that is just a matter of comparison; I don't know why that was put in.

The Master: He wants to know if those figures under the heading "Shipper's assays" do not indicate an assay made by the shipper.

The Witness: I think in this case it covers the pulp sample at Kennett.

The Master: I understand that to be "Yes" to the question.

Q. Did you see these settlement sheets when they were made out?

A. I cannot say that I did.

The Master: I understood your testimony to be that you made the settlement sheets. I am getting very much confused about this procedure. A lot of documents came to your office—which you described—and on them you prepared a settlement sheet.

[fol. 589] The Witness: I sent them to the ore department where the settlement sheets were prepared.

The Master: You did say that you made a calculation about assays.

The Witness: Yes.

The Master: I understood that was made for the very purpose of furnishing the information upon which the settlement sheets were prepared.

The Witness: I sent that calculation for that ore on which the settlement is based.

The Master: In making up the settlement sheets in the ore department, they had at least used that assay on which you had determined the basis of the settlement. You determined that.

The Witness: Yes.

The Master: But the actual figures on these blank forms of settlement sheets were put in the ore department?

The Witness: Yes.

The Master: All the clerical work was done there?

The Witness: In regard to settlements, yes.

Q. The assay that you sent—I am referring to the ores covered by this Exhibit 23—the assays and analysis that you sent into the ore department were prepared by you?

A. Yes.

Q. When you prepared them you had certain——

The Master: You mean the figures of the analysis?

[fol. 590] Mr. Jerome: No, he sent an actual assay sheet into them.

The Master: He did not make the analyses?

Mr. Jerome: No, no.

Q. But you sent an assay sheet in, an analysis sheet in?

A. Yes.

Q. And the figures on that blank were entered by you?

A. Yes.

Q. And when you determined what those figures would be, you had some documents before you, didn't you?

A. Yes.

Q. Did you have the shipper's analyses?

A. In a great many cases I did.

Q. Why didn't you have them in all cases?

A. Because the shipper's assays were not used in settlements.

Q. But isn't it stated in there what the shipper's assay was in these settlement sheets?

A. It is on this one here.

Q. Isn't it in every one on this Exhibit 23?

A. I don't know why they put that assay down on that sheet.

Q. You drew the contract between the Mammoth Conpd. Mining Company and the United States Smelting Company, didn't you—that letter of yours constituted the contract, didn't it?

A. Yes.

Q. And that contract had reference to shipper's assays and analyses, did it not?

A. Yes.

Q. And it provided that when there was a certain difference between the Smelter's assay and the shipper's assay, that is Mammoth, there shall be either an average, or if it was too wide, there should be an arbitration. That is the way the letter read. Why, [fol. 591] in making up this assay sheet that you sent out to the ore department for making up these settlement sheets, did you neglect to examine the shipper's assay?

A. Because I never had the shipper's assay on the Altoona sample.

Q. Where was it?

A. I don't know.

Q. They had it in the ore department, didn't they?

A. No, sir, they did not.

Q. Where did they get their figures for these settlement sheets?

A. I think these are Kennett assays on the Kennett sampling, I am talking about assays taken at Kennett before it was shipped.

Q. Was there always a pulp sample sent from Altoona or Iola to Kennett?

A. Those were the instructions.

Q. You have no reason to believe they were not obeyed?

A. No, sir.

Q. And when they were sent were there not other analyses made at Kennett?

A. I don't know.

Q. And you say these analyses mentioned in these settlement sheets in Plaintiff's Exhibit 23 as shipper's assays or analyses, were not made from the pulp samples?

A. I don't know, I don't think I can testify to that.

Q. Why don't you think so?

A. Because we never received a Kennett assay on Altoona samples. That is the reason I don't think.

Q. What did the assays that came to you show?

A. We always received assays from Kennett at the time the cars were shipped, and we either got those assays by the time the cars would arrive, or before.

Q. Did you have those assays before you when you made up these settlement sheets?

A. Sometimes, I did.

[fol. 592] Q. Why didn't you always have them before you?

A. I may not have always looked at them because we did not take them into consideration.

Q. Why, if they were not taken into consideration, were they entered in each one of these settlement sheets?

A. I don't know, I cannot account for it.

Q. When these settlement sheets were prepared, who was in charge of the office at Kansas City?

A. I don't know when those particular settlement sheets were prepared, whether after I was there or not.

Q. Look at the date in this particular sheet. Couldn't you tell from that?

A. No, sir, I don't say that this is a copy of the settlement sheet made on that date, or made at that time, when I was there—

The Master (interrupting): Suppose they were made at that time?

The Witness: I was there if it was made on that date.

Q. Are not these original papers?

A. I don't know.

Q. But at this date, of this particular one lot, 51, in the settlement sheet in Exhibit 23, you made up the figure 41.9 under "Percent zinc."

A. Yes.

Q. And at that time you had in your custody or under your control, the shipper's assay or analysis, whether made from Kennett samples or from pulp from Altoona or Iola, as the case might be?

A. I probably had one of them.

Q. Why did you assume a per cent higher of zinc content, thus enhancing Beer, Sondheimer & Company's damage, when the ship-[fol. 593] per's analysis showed a per cent lower of zinc content?

A. I did not have the shipper's assay of the Altoona sample, and therefore the result on it did not enter into the calculation. Furthermore, that 41.9 must represent an Altoona or Iola assay, or near to it.

The Master:

Q. When you say "near to it" do you mean either the exact figures or one of those assays, or a split between them of some sort?

The Witness: I mean something in between there. It might not have been an exact split.

The Master: Would it be higher than the highest?

The Witness: No, sir.

Q. Might it be lower than the lowest?

A. I think there are a few cases where it was lower than the lowest.

Q. About how many?

A. I don't recall.

Q. In your direct testimony I understood you to say the zinc content was never higher than the Kennett analysis?

A. No, sir, I did not say that.

Q. Mr. Eardley these actual settlement sheets here were not prepared until long after these transactions,—these settlement sheets attached to Plaintiff's Exhibit 23, were they?

A. I don't know.

Q. Were they being prepared at the time you were in charge there?

A. I don't know.

Q. At this time what were your functions?

A. I was manager of the United States Smelting Company's zinc interests.

[fol. 594] Q. Where was your office?

A. Kansas City, Missouri.

Q. And you had to look out about these different plants?

A. Yes.

Q. Was there anyone over you at Kansas City or were you the head man?

A. I was the head man.

Q. You say you don't know whether there were any settlement sheets prepared between Mammoth and United States Smelting Company at that time, September 18, 1915?

A. No, I did not say that. I said I did not know whether these particular sheets, you showed me, were prepared at that time or not.

Q. Were you not in a position to know what took place between the Mammoth Copper Mining Company and the United States Smelting Company?

A. I don't know when a particular sheet was typewritten?

Q. Were sheets, these particular sheets, or sheets duplicate of these or purporting to be duplicates in existence on September 18, 1915?

A. I don't think so.

Q. When do you think these sheets came into existence?

A. I don't know.

Q. When did you leave Kansas City?

A. April 1917.

Q. Had they come into existence then?

A. I don't know whether these sheets had.

Q. Had these sheets or other sheets purporting to be identical with these?

A. I don't know of any other sheets purporting to be identical. I think the original settlement sheet contained only the settlement assay and the final calculation as to amount per ton and total for the lot.

Q. You left there in April 1917?

A. Yes.

[fol. 595] Q. Left Kansas City?

A. Yes.

Q. And you were head of the whole outfit there?

A. Yes.

Q. And you were familiar with the course of business between the Mammoth Copper Mining Company and the United States Smelting Company and the various United States smelters?

A. Yes.

Q. Up to the time you left Kansas City had there come into existence these settlement sheets attached to Plaintiff's Exhibit 23, or others in similar form, purporting to be the originals or copies of these?

A. The only way I can answer that is to say that settlement sheets covering the particular lots, included in this exhibit, did come into existence, and were sent to Kennett, but they were not of the same form as these. They did not contain the same data as these settlement sheets.

Q. You say these settlements, or originals from which these are checked did not come into existence until after April 1917?

A. I don't know.

Q. Who would know?

A. I don't know. I don't know when those were typewritten.

Q. I am saying they did not come into existence at Kansas City—

A. (Interrupting., I don't know.

Q. (continuing:) Until after you left?

A. I don't know. It is possible they were written up when I was there, or after I was there, upon Mr. Metcalf's request. I would know the original settlements had been made; that was the only thing I was interested in.

Q. I notice in examining these settlement sheets, these settlement sheets attached to Plaintiff's Exhibit 23, that in almost every case [fol. 596] the smelting company's assays is larger than the shipper's

assay or zinc content,—analysis of zinc content—and the settlement assay is always based upon the larger or U. S. Smelting Company's analysis of zinc content. Do you know how that came about?

A. I did not have those assays at the time those settlements were made up.

The *Witness*: Which do you mean?

The *Witness*: The Mammoth Company's assays from the Altoona samples.

The *Master*: You mean that you did not have the assay which is entered on these sheets under the heading "Shipper's assay," or do you mean you did not have either of the assays entered on these sheets.

The *Witness*: I had the one called U. S. S. Co. assay, but I did not have the other assay.

The *Master*: Which is called the shipper's assay?

The *Witness*: Which is called the shipper's assay.

Q. Were you familiar when you were making these settlement sheets between the smelter company and Mammoth, with this provision of your contract? (Reading:) "Each of the parties hereto will have assays made and compare same. Should they agree within a half per cent. of zinc, the average of same shall be taken in settlements. Should the assays not agree within a half per cent. zinc, an umpire assay shall be made by the following chemists."

A. Yes, I was cognizant of that clause.

[fol. 597] Q. Then why, in determining the settlement percentage of zinc contents found in these settlement sheets in Exhibit 23, did you not pursue the terms of the contract?

A. That clause is a similar one that is injected into every contract. In probably a majority of cases the clause is not strictly followed, but either side can invoke it at any time they desire. Mr. Metcalf had the right to request us to follow that had he so desired as other shippers had.

Q. Although the settlement assays and analyses in these settlement sheets in Exhibit 23 were almost without exception higher than the Kennett assay, Mr. Metcalf never asked to have this clause put into effect?

A. No, sir.

Q. Now, what were these things that you sent up to Mr. Metcalf that you called settlement sheets?

A. I would—

The *Master* (interrupting): Describe them. He is asking for a description of the actual papers which you used.

A. A form similar to the form in Exhibit 23, showing only the settlement assay, the weights, the amount per ton, the gross payment of freight and the net payment.

The *Master*: And identifying the lots in any way.

The *Witness*: Identifying the lots by Lot number; also giving the date shipped, received, the station received at, Altoona, date shipped, and E. and M. J.—

[fol. 598] Q. Weren't they exactly the same so far as form and printed matter is concerned, as these settlement sheets?

A. Yes, sir.

Q. Did they have a column for shippers' assay?

A. Yes—no; they did not.

Q. They had three lines under assays, and on the top line was in print the words "U. S. S. Co.", which meant United States Smelting Company?

A. Yes, sir.

Q. And then a blank line which was used to enter the shipper's name and then they had printed below the word "Umpire" in the third line?

A. Yes.

Q. And that was in case if a clause similar to this one in your contract was invoked,—what the umpire's assay would be?

A. Yes.

Q. So you were using exactly these forms while you were in Kansas City and sent them to Mr. Metcalf?

A. Yes, sir.

Q. These ores from Kennett were unique ores, were they not?

A. I don't know anything particularly unique about them.

Q. Do you know of any other mine in this country that produces zinc ores just like these, when you started,—I don't mean the minor contents of zinc ore, copper and precious metals, but the quantity of silica and lime and other elements which bear on the question of smelting?

A. I don't recall any particular mine producing exactly the same silica and iron contents and metal contents as these ores. There may be.

Q. Who employed you originally in this business, Mr. Eardley?

A. What business do you refer to?

Q. The business of the zinc of this parent company, the United [fol. 599] States Smelting, Mining and Refining Company, whatever its name,—I mean the parent company; the company of which Robertson, the plaintiff, was vice-president?

A. You mean with regard to this particular action?

The Master: He is asking you what the name of the holding company was?

Mr. Stockton: He asked who employed him.

Q. What is the name of the holding company?

A. United States Smelting, Refining & Mining Company.

Q. Who in that concern employed you first?

A. No one in that concern.

Q. Who did employ you?

A. Mr. Walter Fitch.

Q. And what position did he occupy in that company, which for brevity I will denominate the parent company?

A. I don't think he held any position in that company.

Q. You are quite sure he did not?

A. I am quite sure.

Q. Does he now?

A. No, sir.

Q. What was his position at that time?

A. He was general manager at Salt Lake of the United States Smelting Company, a subsidiary of the parent company.

Q. When were these smelters at Altoona and Iola purchased?

A. The Altoona smelter was purchased the latter part of June 1915; the Iola plant was taken over on July 2, 1915.

Q. And that was subsequent to the repudiation of the contract with Beer, Sondheimer & Company.

A. Yes.

Q. Who purchased those smelters?

A. I did.

[fol. 600] For whose account?

A. I supposed the United States Smelting Company.

Q. Who paid for them.

A. I don't recall who paid for them.

Q. You don't know who paid for them?

A. No, I don't recall whether it was a draft of the United States Smelting Company or whether it was a draft of the United States Smelting Refining & Mining Company.

Q. And were you the manager at that time of the United States Smelting Company?

A. No, I was not the manager at that time.

Q. What was your position?

A. Ore Purchasing Agent for the United States Smelting Company.

Q. Isn't it a fact that the parent company paid for those smelters?

A. I could not state as to that.

Q. You were in consultation with the officers of the parent company before these purchases were made by you?

A. Yes, I was.

Q. And the ultimate decision of purchasing, or in purchasing at the price agreed upon was determined by them, was it not?

A. Yes, it was.

Q. You took your orders in regard to the consummation of the purchase from them?

A. Yes, sir.

Q. In the discussions with them, did it develop that one of the purposes of the purchase of these smelters was to work up and smelt these particular ores that Beer Sondheimer would have had to take had the contract not been repudiated?

A. That was one of the considerations.

Q. After you left Kansas City, where did you go?

A. I went to Joplin, Missouri.

[fol. 601] Q. That was the seat of what smelter?

A. It was the seat of the Pitcher Lead Company but I was not identified with that.

Q. This last settlement sheet annexed to Plaintiff's Exhibit 23, is the last settlement between the Mammoth Copper Mining Company of Maine and the United States Smelters, isn't it?

A. That is the last one in this exhibit.

Q. February 17, 1916, lot 6?

Mr. Metcalf: No, that is not; lot 146, Altoona is the last.

Q. The last settlement sheet between Mammoth and United States Smelter was March 27, 1916?

A. Yes.

Q. And you were still then at Kansas City?

A. Yes.

Q. So that all of these settlement sheets that appear here, the original settlements during all that period up to the last shipment of this Beer, Sondheimer ore, the figures for the settlement were furnished by you?

A. Yes.

Q. You had contracts with several other mines, or ore sellers, to smelt zinc ores, did you not?

A. Yes.

Q. During this period?

A. Yes.

Q. And those ores varied in metallic content, did they not?

A. Yes.

Q. I mean as between this different mines?

A. Yes.

Q. Some of them carrying higher quantities of the precious metals and others lower and so in regard to zinc and copper contents?

A. Yes.

[fol. 602] Q. And some of them smelted more readily than others, did they not?

A. Yes, there is a difference in smelting ores.

Q. And with these different persons who sent ore to you other than Mammoth there arose from time to time questions between their assays and your assays, did there not?

A. With some of them, yes, sir.

Q. And those were referred to the umpire specified in the contracts with those concerns?

A. Yes.

Q. Who were selected when co-assayers?

A. Yes.

Q. It was practically the universal practice with you in each contract, or was the universal practice, that when a difference in these assays amounted to one per cent. or more, that unless you come to an agreement on that, it should go to an umpire?

A. No, the splitting limit was usually stated as five tenths of one per cent.

Q. One per cent. was a wide splitting?

A. That was a fairly wide split.

Q. Did you have a splitting limit as wide as one per cent. with anybody else?

A. I don't recall any where we had that wide splitting limit.

Q. When you made up these assay sheets, or when these settlement sheets were forwarded to Mr. Metcalf, the settlement assay

therein contained, the figures for the settlement assay were figures prepared by you?

A. Yes.

Q. In the preparation of those figures for zinc contents, what did you have before you?

A. I had the Iola assay?

Q. If it had gone to Iola?

A. I had the Iola assay and the Altoona assay, always. I may have had the Kennett assay on the Kennett sample; that does not always follow.

[fol. 603] Q. There is no data that enables you to say now whether in any of these shipments your Altoona and Iola assays agreed?

A. I don't know of any.

Q. But were not in some instances, your Altoona samples composite samples,—several carloads?

A. Yes, we handled,—we made lots of more than one car at times.

Q. If you had had at about the same time a controversy over a carload of ore, a quantity of ore in regard to the settlement assay,—we will say with the Butte and Superior—and one of the umpires named was an assayist in Denver, at the time you came to make up this settlement assay of zinc contents between Mammoth and United States Smelting Company you would have the report of that umpire before you, wouldn't you?

A. I don't know if I had it before me. I probably had it in my mind, I would know what it was.

Q. If from that umpire's report you thought the Altoona or Iola assay or the two combined were not running, in your judgment,—were running too high or too low you would apply some principle of correction, wouldn't you?

A. One result would not have any influence on the assay arrived at. If there were a number of cases at the same time where invariably the customers' assays was higher than the, Altoona.

Q. So in making up your percentage of zinc contents for settlement between the United States Smelter and Mammoth, you did as shown in Exhibit 23, in a majority of cases, in almost every case, disregard both the analysis of your own chemists at Altoona and Iola, and also the Mammoth chemist at Kennett, and made [fol. 604] up your figure by looking at other analyses and applying such checks as in your opinion would properly apply?

A. I did not have the Mammoth Copper Mining Company's assay on the Altoona or Iola sample at the time I arrived at this assay, and I did not disregard the Altoona and Iola assays, but used them as a basis in arriving at the assay shown.

Q. What was the principle that applied; they vary with each lot; what principle did you apply?

A. The principle of fairness; that is the only principle I could tell you.

Q. If your Iola and Altoona assays showed 40.2 per cent. of zinc and some customers' assay showed 41.7, what principle of fair-

ness is there that would enable you to determine what you would call the settlement between yourself and the customers?

A. I would not take the customers' assays unless it entered into the computation. Therefore I would only take the Altoona and Iola assay to determine what was fair.

Q. Then what you were billing other customers,—or sending them these settlement sheets, you did not take into consideration their assay?

A. A great many we did not.

Q. You made it up entirely from your Altoona and Iola assays?

A. Yes, sir.

Q. What principle of fairness did you apply whereby you changed your Altoona and Iola analyses to the analysis that you finally put in such settlement basis?

A. As I have stated before, if either laboratory was running constantly high over a period of a week, for example, with all other chemists, I would give more regard to the other assay made at Iola [fol. 605] than I would at Altoona, providing Altoona was the one running constantly high.

Q. But you got the returns from other chemists, did you not?

A. Oh, yes.

Q. I thought you just stated to me that you would not have the customer's assays?

A. I said in a large number of cases. In a large number of cases we did not compare with other chemists I would say that in fifty per cent. we did compare assays, and in fifty per cent. we never compared the assays.

Q. When you say the other chemists you mean the chemists of the customers?

A. The chemists of the customers.

Q. Did you assume they were superior to the men in your employ?

A. If I found they were all running uniformly higher than one particular one, I would assume that that particular one was wrong.

Q. One was working on a different class of ore?

A. That may be so.

Q. Isn't that the fact?

A. Yes.

Q. If you found that ten or fifteen chemists working on different classes of ore got a half per cent more zinc content than your Altoona chemists were giving you for the same ores respectively, what principle would you apply in making up your settlement assay?

A. I would assume that Altoona was probably a half per cent. high.

Q. You mean a half per cent lower?

A. A half per cent lower. And if the Iola assay was a half per cent. higher than Altoona I probably would use the Iola assay as representing nearer the true content of that ore.

[fol. 606] Q. So that in a case in settling with Mammoth, if you found that your Altoona analysis as compared with analyses of different classes of ore made by other chemists seemed to be running

low you would add to the Altoona analysis an amount of zinc content that seemed to you to make it about right?

A. I would not add to Altoona. I probably would use the other assay or near to it.

Q. Although the assays covered entirely different ores. .

A. I am talking about Iola assays.

Q. Did Iola and Altoona ever agree?

A. I suppose there were exceptional cases where they got the same results; but very seldom.

Q. Suppose the difference found was almost negligible between Iola and Altoona?

A. I would not say always. I would say within probably a half per cent, of one another.

Q. Did you have a rule that when they did not agree within four tenths of one per cent.—Iola and Altoona—there should be a re-assay?

A. I certainly did not.

Q. Did you have any rule—

A. (Interrupting.) No, sir, I did not; that was a rule between the chemists themselves. I knew nothing about it until this suit was begun.

Q. Suppose in checking up Altoona and Iola assays against assays of other chemists for different classes of ore, I mean, ore other than the Mammoth ore, you found and reached the conclusion that those for Altoona and Iola ran about a half of one per cent. in zinc content lower than the analyses for other ores shown by other chemists, what then?

A. I don't remember any such case existing where they both were running lower.

[fol. 607] Q. Or running high?

A. I don't remember any such case.

Q. Don't you remember any cases where they both differed from other chemists?

A. Not both high and low?

Q. When they both differed what did you do then.

A. I would use my own best judgment in arriving at a fair assay.

Q. How did your judgment work?

A. Give me a specific case, and I will do my best to tell you the mental process.

Q. Take then a specific case. Take this same sheet Lot 51, on settlement sheet Plaintiff's Exhibit 23, how did you arrive at 41.9?

A. I don't know. I haven't the data before me. If I had the Altoona and Iola assays and the—

Q. (Interrupting.) Examining these various Plaintiff's Exhibits 49, being the Altoona assay certificates, also marked 44-1,—44-5, and Plaintiff's Exhibits 41, 42, 46, being the Iola laboratory reports, purporting to be the Iola assays on the same lots, and the settlement sheet forming part of Exhibit 23, and referring to Lot 60, please state how you arrived at the per cent. of zinc as 42.5?

A. I cannot tell you how I arrived at it. I can give you the probable solution; that is all.

Q. Can you tell me what data you had before you when you made that figure?

A. I undoubtedly had the assay from Iola, just now before me showing one result at 43.3, and one result as 43.2; also the Altoona assay sheet which is before me showing one result as 43, and the other result as 42.7. The settlement assay is 42.5. The way I would explain that is that I probably had the Kennett assay of the Kennett sample before me, which was much lower than 42.5, and I used the [fol. 608] two tenths lower than the lowest Altoona assay.

Mr. Jerome: Will counsel stipulate that the Kennett assay of the Kennett sample on this lot appears from Plaintiff's Exhibit 25-5 as 43.0?

Mr. Stockton: Yes.

The Witness: I never had this sheet Exhibit 25-5.

Q. I show you this book, Plaintiff's Exhibit 49, also marked 44-1-5, and under date of September 12th there is—number 63,—what purports to be a corrected assay certificate, what is that?

A. That represents an assay certificate from Altoona showing a corrected assay. He probably discovered some error in his former assay.

The Master: From whom does it come?

The Witness: The chemist at Altoona, and it was in my hands at the time that this settlement was made. This assays shows one result 42.2, and the other 42.5.

Q. You fall back all the time,—you say you applied the principle of what seemed fair to you. Had you no standard method of determining what you would make this settlement figure of zinc at?

A. No, I don't know of any standard method other than what I have stated.

The Master: Isn't it a fact that you had before you in preparing this settlement sheet an Altoona assay and an Iola assay on the same ore?

[fol. 609] The Witness: Yes, sir, that is the fact.

The Master: Did you bring this general knowledge that you had derived from work done on the shipments of other customers to bear on your decision as between the Iola assay and the Altoona assay?

The Witness: Yes, sir.

The Master: And in reaching a result, do you say that you never took a higher assay than one of those two, or either took one of them, or made a compromise between them?

The Witness: I don't recall using a higher assay than the highest of those two.

The Master: What you mean when you say you used knowledge derived from assays upon other shipments and from other laboratories, is that you used that knowledge in making a decision between the Iola assays and the Altoona assays, and possibly in some cases the Kennett assay on these particular Kennett ores.

The Witness: Yes.

Q. Have you any explanation to give why, in the settlements sheets attached to Plaintiff's Exhibit 23, Mr. Eardly, with hardly an exception the zinc content used as a basis of settlement is uniformly the zinc content found by the assay of the United States Smelting Company which you made up, and is, as I said, invariably almost higher in zinc content than what is entered as the shipper's?

A. I don't know.

Q. You don't know how that came about at all?

A. No, sir.

[fol. 610] The Master: In those settlement sheets, under the heading U. S. Smelters assay, the one that you gave to the clerical department is what they should use in making up the form?

The Witness: Yes, sir.

The Master (continuing): Which is the result of your computation that you have described?

The Witness: Yes.

The Master: I understand that is the figure that they were instructed to use—

Q. The expense of handling, of smelting and marketing the metal contents of these ores that came from Mammoth to the United States Smelting Company, which would have gone to Beer-Sondheimer if the contract had not been repudiated, were those expenses less in amount than the value of the metal extracted?

A. Yes.

Q. Considerably?

A. Yes.

Q. So, as a matter of fact, the United States Smelting Company made a profit on these ores by smelting?

A. Yes.

Q. And that profit went to the parent company did it not?

Mr. Stockton: I object to the question.

Objection overruled. Exception.

A. It went to the United States Smelting Company.

Q. And from there what happened to it?

A. Well, I was not interested.

The Master: You have testified that there was a holding company?

[fol. 611] The Witness: Yes.

The Master: This United States Smelting & Refining Company owned the stock of the United States Smelting Company?

The Witness: Yes.

Q. In these transactions between,—these intercompany transactions, they were all represented not by cash payments between the companies, but by entries on the books of the parent company in Boston, were they not?

A. They were all represented by credit memos, sent from the different subsidiaries.

Q. You spoke something about the risk involved in this contract between Mammoth and the United States Smelting Company

when spelter was at eleven cents a pound. Was there any risk to the United States Smelters in such a contract when they could cancel on five days' notice?

A. The price of spelter was fluctuating to such a degree, having risen from a normal price of around five cents in 1914, to twenty six or twenty seven cents in June 1915, then back the next week to seventeen and three quarter cents, and then the next two weeks to twenty-two and a half cents and then the next month down to ten and a half cents,—the large variations were so marked, the fluctuations so marked that one could not tell one day what the spelter price would be the next. We did not know either as to how long the war was going to last and we were of the opinion if the war was discontinued we would probably see pre-war prices, and if we paid eleven cents for any spelter in ore, we took the risk of getting only four or five cents if it should suddenly cease.

[fol. 612] Q. Did you when you had a five day cancellation clause?

A. Yes, there was some risk. A good deal of ore would be in transit and in process of being received before that five days was up.

Q. What was the largest quantity of ore ever in transit in any five days from Kennett?

A. I don't know.

Q. Why, when your chemists in the assay department showed moisture below one per cent., and in ascertaining the dry weights, did you fix a minimum moisture of one per cent.?

A. The general custom among a number of smelters.

Q. What smelters—all smelters.

A. I cannot say as to that. I know it was among a number.

Q. Was there anything in the contract about that?

A. No, sir.

The Master: Could that particular minimum have worked against you?

The Witness: We tried to provide a rule so that it would not work against us.

The Master: If it turned out by actual examination to be higher than one per cent.—

Q. (Interrupting.) You always took the high?

A. We always reported the actual except when under one per cent.

Q. When it was under one per cent. you called it one per cent.?

The Master: Is the determination of moisture an uncertain thing?

The Witness: It is where the percentage is so low.

[fol. 613] Q. While this contract between Mammoth and the United States Smelting Co. was in existence you had a number of toll contracts, did you not?

A. I think we had three that we were handling at Altoona and Iola.

Q. And under the toll contracts which you had, some of those toll contracts, if not all of them, were entered into before the agree-

ment between Mammoth and the United States Smelters, were they not?

A. Only one of the three that I referred to.

Q. What was that?

A. The Big Four Exploration Company.

Q. Under these toll contracts if the price of spelter rose the customer received at least some of the benefit?

A. Some of the benefit.

Q. He received the greater part of the benefit, did he not?

A. No, sir, he did not.

Q. He did not?

A. No, sir.

Q. What percentage did he usually receive?

A. In the case of one contract I recall he received thirty-five per cent. of the benefit and the smelter sixty-five per cent. of the benefit—the mine thirty-five. And in another case the mine secured forty per cent. and the smelter sixty per cent.

Q. What did the Butte and Superior, in their toll contract receive?

A. That is not one of the contracts I referred to.

Q. That was a toll contract was it not?

A. We had a toll contract with the Butte and Superior for the capacity of the La Harpe smelter, which has not been mentioned.

Q. It was a toll contract made between the Butte and Superior and the United States Smelters?

A. Yes, sir.

[fol. 614] Q. To smelt their zinc ores under a certain agreement?

A. Yes, sir.

Q. What per centage of the increased value of spelter did they get?

A. I don't know. It was not so stated. The terms of the Butte and Superior contract were these. We secured fifteen dollars a ton for the treatment of the ore based on a five cent spelter market. For each cent increase in the price of spelter above five and up to ten, we secured two dollars additional; and for each cent additional increase above ten cents we secured three dollars additional up to a maximum of sixty dollars a ton.

Q. What per centage of profits of the increase in spelter would go to Butte and Superior?

A. I should say, just offhand, when it is over ten cents, about fifty per cent.

Q. Was the Butte Superior contract in force and effect when this contract between the Mammoth Copper Mining Company and the United States Smelters was entered into?

A. Yes.

Q. And you knew about it?

A. I made it.

Q. After spelter rose above eleven cents, whatever price it went to, it gave Mammoth no advantage?

A. No, sir.

Q. Under that contract?

A. No, sir.

Q. And if it started to fall in price below eleven cents, down very low, you could cancel it on five days?

A. I think that is the provision.

Q. There was no reason why you could not have made a toll contract between Mammoth and United States Smelters, was there?

A. I don't know of any reason why we could not.

Q. Have any of your toll contracts any five days' cancellation [fol. 615] clause in them?

A. Not five days, I think they have a thirty day cancellation clause.

Q. Did any have as short cancellation clause as this Mammoth contract?

A. No, we gave Mr. Metcalf the preference.

Q. And reserved a preference for yourself too?

A. I deemed that an advantage on his side.

Q. Isn't it a fact that you had the right to cancel on five days' notice and you understood you had?

A. Yes.

Q. And you understood you had when you made the contract?

A. Absolutely.

Q. And you drew the contract?

A. Yes.

Q. And it was approved by the parent company's officers?

A. It was approved by Mr. Heintz, the general manager of the United States Smelting Company and Mr. Anderson the general manager of the Mammoth Copper Mining Company.

Q. Was there no parent company officer consulted about it at all?

A. I don't think so.

Q. You are quite sure?

A. Before it was made, I am quite sure they were not.

Redirect examination by Mr. Stockton:

Q. Mr. Eardley, with reference to this shipment lot 51, concerning which you were interrogated on cross examination, merely as an illustration, you were asked from where you obtained the figures on the United States Smelting Company settlement sheets, Exhibit 23, for the United States Smelting Company's zinc analyses. Will you examine the sheet dated September 3, in Plaintiff's Exhibit 49, and the sheet dated September 8th, 1915, in Plaintiff's Exhibit 46, and [fol. 616] state whether there is anything there from which you can refresh your recollection as to how you obtained the settlement sheet?

A. The settlement sheet is an exact average of the two Altoona assays.

Q. The exact average of the two shown on the Altoona assay certificates?

A. Yes.

Q. What is the Altoona assay?

A. One result is 41.8; the other result is 42.0; the settlement result 41.9.

Q. Is that higher or lower than the figures——

A. (Interrupting.) A split between the two.

Q. Is it higher or lower?

A. The figure I used in settlement was 41.9.

Q. I am talking about Iola; what was the Iola assay for that lot?

A. For lot 51, one result is 42.4, in the other 42.2; the settlement assay is lower than the Iola assay.

Q. Will you state in detail the circumstances under which the Butte and Superior contract was made?

A. I went to Kansas City about June 8th, 1915, to take up with Mr. George E. Nicholson the purchase of the Altoona zinc smelter. I found in Kansas City at the same hotel at which I was stopping Mr. Charles Bocking, the present manager of the Butte Superior Mining Company. He held an option on the La Harpe Smelter owned by George E. Nicholson. He came to me and advised me that he had this option, and he stated that they were not in the smelting business, and he would much prefer his company would, that we buy that smelter and treat his ore rather than their taking the smelter over and going into the smelting business, and we figured out together a basis upon which his company would be willing to do business. It was not satisfactory to our people, but a proposition was put up to [fol. 617] us this way: If you will take our ore and treat it on this basis you can buy the La Harpe smelter; otherwise, we will go ahead and purchase it ourselves; so that the terms of the Butte Superior contract do not reflect what I consider the market price for ores at that time. We figured that even on those terms,—spelter was then around 26 cents—our people felt that it would still go higher, and we would get the maximum of \$60, provided; that in five months time we should pay for the La Harpe smelter, and realize a profit of probably fifty per cent.

Q. At that time, could you have made toll contracts for ores similar to the Butte and Superior ores, upon terms more favorable to the United States Smelting Company?

Mr. Jerome: Objected to as purely hypothetical.

Objection overruled. Exception.

A. I made some contracts right after that on more favorable terms.

Q. What contracts were they?

A. The contract with the Victor Reduction Company, and one with the Silverton Mines Company.

Q. Did you have a contract with the Big Four Exploration Company?

A. Yes, sir.

Q. Were there any peculiar circumstances attending the making of that contract?

A. Yes, sir.

Q. What were they?

A. Mr. Nicholson prior to giving Butte and Superior an option, had obligated himself to the Big Four Company on a certain basis, and when I entered into the negotiations with Mr. Nicholson to take [fol. 618] over the plant, that La Harpe plant, instead of Butte and Superior Company, he would only allow that being done upon our assuming that contract which he had negotiated with the Big Four Exploration Company, and those terms had been arranged between

Mr. Nicholson and the Big Four Exploration Company before we took over the plant.

Q. Have you made a computation as to what the average price of spelter was on the dates used for the hypothetical settlement sheets with Beer, Sondheimer & Company in Plaintiff's Exhibits 16, 21 and 23?

A. I have.

Q. Will you state what that average is?

A. 14.18 cents per ton.

Q. Will you state what is meant by the term smelting margin?

A. I mean by that the amount the smelter would have to secure to cover the cost of smelting, to cover the freight on the recovered spelter from the smelting plant to East St. Louis, and the selling commission on the spelter, and profits.

Q. Have you made up a statement showing the comparison between the amounts which would have been received by various shippers under contract with the United States Smelting Company during the year 1915, the early part of 1916, and the amount received by the Mammoth Copper Mining Company from the United States Smelting Company with Spelter at the average price of 14 cents per pound?

A. Yes, sir.

Q. Have you obtained copies of the contracts made with various shippers during the year 1915 and the early part of 1916?

A. Yes.

Mr. Stockton: I ask to have this paper headed "Statement of various ores purchased under contract, showing amount shipper would [fol. 619] receive on 14 cents spelter market, the approximately average price from July 21, 1915, to February 26, 1916," marked for Identification.

Paper referred to marked Plaintiff's Exhibit 110 for Identification.

Q. Do the shippers mentioned on Plaintiff's Exhibit 110 for Identification constitute the only shippers with whom the United States Smelting Company made contracts on a sliding scale, or a toll basis during the year 1915?

A. No, sir.

Q. What other shippers were there?

A. We had numbers of contracts covering carbonate ores, which are not comparable with these.

Q. Were there any other contracts for zinc sulphide ores made during the year 1915 than those mentioned in that sheet?

A. There is only one I know of. That was not in effect until 1916; it was made in December, 1915.

Q. What one was that?

A. With the Lanyon Zinc Company.

Q. That did not become effective until 1916?

A. No, sir; except also the contract with Butte and Superior.

Q. I ask you if you have obtained copies of the original contracts which are covered by Exhibit 110 for Identification?

A. Yes. (Witness produces a package of papers, most of which he says are the originals themselves.)

Paper referred to marked Plaintiff's Exhibit 111 et seq. for Identification.

[fol. 620] Q. Will you state in detail just how you arrived at the figure 29.60 on Plaintiff's exhibit 110 for Identification representing the amount the shipper received at 14 cents spelter, and 40 per cent. zinc content for the ore from the Big Four Exploration Company?

A. 40 per cent. zinc converted into pounds is 800 pounds. I took 80 per cent. of that as an assumed recovery, making 640 pounds recovered. I applied against that 640 pounds, 14 cents per pound, and deducted from the amount obtained \$60 per ton, which left \$29.60.

Q. How did you arrive at the figure \$60 per ton which you deducted?

A. That was the amount specified in the contract as the toll charge.

Q. At 14 cents spelter?

A. That was the minimum charge which would govern on 14 cents spelter.

Q. Will you tell how you arrived—

By Mr. Tibbetts:

Q. Did not the contract provide a lower toll charge during part of the period covered by the contract?

A. Yes, sir.

Q. And this toll charge of \$60 is only during a part of the period?

A. Up to January 1st, 1916.

Q. That is, during the month of September, October, November and December?

A. Yes.

Q. At what time during the existence of the contract did it call for a lower toll charge?

A. The period succeeding January 1, 1916.

By Mr. Stockton:

Q. Referring to the line concerning the ores received from the [fol. 621] Pingrey Company, will you state how you arrived at the figure 44 representing the amount received from the shipper at 14 cent spelter on 40 per cent. zinc?

A. The terms of the contract provided a payment of \$17 for 40 per cent. of zinc when spelter was selling at 5 per hundred weight. They were to secure \$4 for each cent rise above five cents spelter and up to seven cents spelter, so that there was \$8 to add to the \$17, to cover the rise up to seven cents spelter. They were to receive \$3 for each cent rise in the price of spelter above 7 cents per pound and up to 14 cents per pound, so that there was \$21 to add to the \$17 plus the \$8 for that additional increase in the spelter price, making a total of \$44.

Mr. Tibbetts: It makes a total of \$46, as I get it,—17 and 8 and 21.

The Witness: 17 and 8 (hesitates)—I guess that is right.

Q. \$46, is that right?

A. Yes, that is right.

Q. And were the figures representing the amount which would have been due the Poland Company on the following line arrived at in the same manner by calculating them from the terms of the contract?

A. Yes.

Q. I call your attention to this Plaintiff's Exhibit 110, and ask if there are any contracts there summarized,—name the contracts which you have summarized which do not represent payments for the ore on a toll basis?

A. The Bolivar M. T. & T. Company, F. J. Lyoris, Pingrey, Poland Mining Company, Mammoth Copper Mining Company.

Q. Will you state whether those contracts contained any provisions for a maximum rise in spelter?

A. Yes, sir.

[fol. 622] Will you state what the limits are?

A. Mammoth Copper Mining Company, 11 cents. Bolivar—

The Master (interrupting): You mean a figure beyond which no additional price goes to the shipper?

Mr. Stockton: Yes.

A. (Continuing:) Bolivar, 11 cents; Pingrey, 14 cents; Poland, 12 cents. F. J. Lyons received just a flat price for his ore,—no increase on account of spelter price.

Q. Did you make up a statement showing the comparison of the smelting margin on various ores which were bought by the United States Smelting Company during 1915 at a flat price, and the smelting margin on Mammoth Copper Company ores?

A. Yes.

Q. Is this that calculation; is this that statement?

A. Yes.

Paper referred to marked Plaintiff's Exhibit 112 for Identification.

Q. Do these papers (handing papers to witness) represent the original contracts with the Interstate Consolidated Callahan?

A. This represents the agreement covering all of the ores on this particular sheet other than the Joplin Ores.

The Master: This bunch of contracts represents all the shippers—

The Witness (interrupting): It represents the contracts covering [fol. 623] all of the ores shown on that sheet, Plaintiff's Exhibit 112, with the exception of the Joplin ores.

Mr. Stockton: I ask to have that marked for Identification.

Paper referred to marked Plaintiff's Exhibit 113 for identification.

Q. Will you state under what circumstances you purchased the Joplin ores?

A. We bought them at an outright figure based on the percentage of zinc content.

Q. Did you have a particular contact with the seller, or did they consist of purchases from time to time?

A. Purchases from week to week.

Q. Were those purchases each on individual terms, or were they under a general agreement?

A. Each one was purchased on its own merits.

Q. Excluding Joplin ores shown on that sheet from consideration, Exhibit 112, will you state whether there were any other ores purchased by the United States Smelting Company for a flat price during the year 1915 with the exception of those mentioned on Exhibit 112?

A. In this connection I would like to state that I went through the files of the company at Baxter Springs, Kansas, and took out all of the papers relating to the purchase of sulphide shipments, and these papers represent all of the papers I could find in the file representing the purchase of sulphide shipments on a flat basis.

Q. There were some other purchases made on a flat price basis during 1915 besides Joplin ores and those mentioned on Plaintiff's Exhibit 112, were there not?

A. Yes, there were individual lots.

[fol. 624] Q. About what tonnage would they aggregate?

A. I think the total aggregate of ores purchased in 1915 outside of those shown in these compilations would be about a thousand tons.

Q. Does Plaintiff's Exhibit 112 purport to show all the purchases of Joplin ore made by you?

A. No, sir.

Q. Will you state how you obtained the data which you put down on Exhibit 112 for Joplin ores alone?

A. Mr. Bjortsberg and Mr. Metcalf and I were at the Baxter Springs office, and I asked them to take the ore purchased record, and call off to me a lot here and there on down as representative, so that I would have no part in the selection of any particular lots, and these were the particular lots they called off.

Q. And the terms on which you purchased those lots which they called off are the ones shown on Exhibit 112?

A. Yes, sir.

Q. Why did you select these in that manner rather than enumerating all the purchases?

A. Well, if we should enumerate all the purchases we would have independently too many sheets of cars.

Q. So far as your—

The Master (interrupting): Your reason is that the whole number of purchases was so numerous—

The Witness (interrupting): Yes, that I simply wanted to get representative lots.

Q. And so far as your knowledge goes, those purchases shown on Exhibit 112 are representative lots?

A. Yes, sir.

[fol. 625] Q. Will you state how, on Plaintiff's Exhibit 112, you calculated the smelter margin for Mammoth ore, as shown on the first line opposite the date 7/19/15?

A. I took 40 per cent. zinc as the basis, converted it into pounds—800 pounds. I took 80 per cent. of that as the estimated recovery, making 640 pounds. I applied against that 640 pounds,—\$18.50, which was the spelter quotation on the date that particular car shipment was purchased, and deducted from the amount so obtained the amount we had to pay Kennett for that particular ore under contract.

Q. Will you state how you obtained the figure on the same line showing a smelting margin on Joplin ore purchased on that date?

A. This particular car of Joplin assays 54-56 per cent. of zinc. I converted that into pounds, and took 85 per cent. of it, and applied against that number of pounds 18½ cents per pound, which is the price of spelter on the date of the purchase, and deducted from the amount so obtained the amount we paid for that particular lot.

Q. Giving you the figures—

A. (Interrupting.) Giving the figures shown on this Exhibit 112 as the spelter margin to cover smelting, freight to East St. Louis, and profits.

Q. Do you consider, from your experience as manager of the zinc smelting properties of the United States Smelting Company, that 80 per cent. is a proper figure to use for the recovery of the zinc from the Kennett ore?

A. Yes, I do.

Q. And do you consider 85 per cent. a proper figure to use for the recovery of zinc from the Joplin ore?

A. It is plenty low enough.

[fol. 626] Q. You do consider it a correct figure then?

A. Yes.

Q. Will you state how the smelting margin of Joplin ore bought July 19, 1915, compares with the smelting margin on Kennett ore bought and paid for under the Kennett contract on that date?

A. The margin of the Joplin ore is 82.29, and on the Kennett ore 82.40.

Q. So that the smelter made as much in purchasing the Joplin as it did in purchasing the Mammoth Copper Mining Company ore?

A. Yes.

Q. Now, with the exception of the purchase of Joplin ore, and the 1,000 tons of miscellaneous small purchases which you have already mentioned, do the ores purchased, shown on Exhibits 110 and 112 constitute all the ore purchased by the United States Smelting Company during the year 1915?

A. As I stated, as far as I can determine, by going through the files at Baxter Springs, Kansas, that is the fact.

Q. And so far as you know, that is all the ore that was purchased during that time?

A. They were all except the Butte Superior.

Q. With the exception of the Joplin and the Butte Superior ore, and the miscellaneous lots making about a thousand tons?

A. As far as the files show, and the Lanyon Zinc Company.

Mr. Stockton: I offer these in evidence.

Mr. Jerome: I have no objection conditioned upon the Butte and Superior contract being filed as part of them.

(Paper referred to not put in evidence until the Butte and Superior contract is attached.)

[fol. 627] Q. Will you compute the amount that Butte Superior Company would have received at the average price of 14 cents a ton of spelter on 40 per cent. zinc?

A. They never shipped any such products.

Q. What kind did they ship?

A. They shipped at 52 to 55 per cent.

Q. Compute it, first, on the basis of 40 per cent. and then on the basis of 52 per cent?

A. Butte and Superior under their contract would have received for 40 per cent. zinc, at 14 cents spelter, \$55.40 per ton, less the freight from the smelter to East St. Louis, and the selling commission, computed together, \$2.50 per ton, making around \$53.

Q. Amounting to how much—

A. (Interrupting.) Providing they secured 14 cents for their spelter on the 52 per cent. product, on the same basis they would receive \$83.12, less about \$2.50, being about \$80.60 a ton.

Q. How much would Kennett have received on a 52 per cent. ore?

A. \$54.

Q. A ton?

A. Yes.

Q. Will you explain how you make the calculation showing the amount received for Butte and Superior at 40 per cent zinc?

A. 40 per cent. equals 800 pounds; $82\frac{1}{2}$ of 800 pounds equals 660 pounds; at 14 cents, equals \$92.40, less \$37, equals \$55.40.

Mr. Tibbetts: What is the $82\frac{1}{2}$ per cent?

The Witness: Recovery.

Q. Did you find there was a larger recovery of Butte-Superior than Kennett?

A. We had to pay them $82\frac{1}{2}$ per cent. under their contract.

[fol. 628] Papers heretofore marked Plaintiff's Exhibits 110 to and including 113 for identification, now marked in evidence.

Q. Did you make a search for any correspondence showing offers made by the United States Smelting Company during the year 1915 to shippers for zinc ores?

A. Yes.

Q. Did you find any copies of such correspondence?

A. Yes.

Q. Will you produce those copies?

A. I have them here.

(Witness produces papers.)

Mr. Stockton: I ask that they be marked for identification.

Papers referred to marked Plaintiff's Exhibits 114-1 to 114-14 for identification.

Q. Were these letters written by you, Mr. Eardley?

A. Yes, sir.

Q. Do they represent all the correspondence that you could find on that subject written during the year 1915?

A. All I could find in the files covering sulphide ores.

Mr. Stockton: I offer them in evidence as Plaintiff's Exhibits 114-1 to 114-14.

Mr. Jerome: I don't think these are admissible, letters written by the plaintiff. I object to their introduction.

The Master: I will exclude these offers.

Mr. Stockton: On what ground do you object, Mr. Jerome?
[fol. 629] Mr. Jerome: As incompetent, and as self-serving declarations.

Mr. Stockton: Exception.

Q. Did you read the deposition of Edwin Anderson taken in this case?

A. Yes, sir.

Q. Did you make up a summary—did you make up a comparison from the figures and facts shown in the deposition of Edwin Anderson, to show the comparison between the price which would be received by the Mammoth Copper Mining Company when Spelter was at 14 cents on 40 per cent. zinc, and that which would have been received by the shippers selling ore under those contracts to the American Smelting and Refining Company?

A. Yes (witness produces papers).

Mr. Stockton: I offer this in evidence as Plaintiff's Exhibit 115.

Mr. Jerome: I don't think this competent or relevant. I object to this paper.

The Master: I receive it on the ground that counsel states, and the witness says, that it is merely a compilation from certain figures in Mr. Anderson's deposition. If that portion of Mr. Anderson's deposition is subject to an objection which should be sustained, why this paper will go out with that testimony.

Mr. Jerome: That is satisfactory.

Paper referred to marked Plaintiff's Exhibit 115 in evidence.

Re-recross-examination by Mr. Jerome:

Q. Do these Exhibits 110, 111, 112, 113 and 114 show the estimated profits on ores coming from Kennett?

A. No, sir.

[fol. 630] Q. They don't?

A. No, sir.

Q. There was a profit on all those ores, wasn't there?

A. Yes.

The Master: You mean an ultimate profit on the sale of the spelter?

Mr. Jerome: Yes.

Q. In other words, that in receiving and treating those ores there was a net profit to the United States Smelting Company?

A. Yes.

Q. For which they got credit in Boston on the books of the parent company?

A. There was a credit to the United States Smelting Company.

Q. And they ultimately received credit for that on the books of the parent company in Boston?

A. I don't know anything about the books in Boston. The U. S. Smelting Company made a profit.

The Master: On its dealings with the Mammoth Copper Mining Company?

The Witness: Yes.

The Master: You mean a profit, of course, on the United States Smelting Company figures in its contract?

Mr. Jerome: Yes.

Q. I mean, after what you had to pay for the Mammoth Copper Company ore, and after all expenses of handling and selling, all your overhead and other charges, you had a sum to the good?

A. Yes.

Mr. Stockton: Objected to.

Objection overruled.

Exception.

[fol. 631] Q. These contracts that have been put in evidence here as Plaintiff's Exhibit 111, with the exception of the Butte and Superior contracts, are all the contracts during this period that the U. S. Smelter had of the character of the Mammoth contract in a general way?

A. As far as I could find in the files.

Q. Will you tell me what the shortest period of cancellation is in any of those contracts, the right to cancel on the part of the United States Smelting Company?

A. There is one contract that provides for cancellation under certain conditions without giving any notice at all.

Q. Can you find any contract in there that gives the United States Smelting Company the absolute right to cancel—of the contracts in Plaintiff's Exhibit 111?

A. Yes, the contract with the Silverton Mines Company, Limited, had the privilege of cancelling the contract in the event they didn't ship 200 tons a month.

Q. I said the absolute right to cancel without any conditions?

A. No, sir, I don't think there is any such here.

Q. So of all the contracts that during this period you had with any company in regard to sulphide ores, a contract similar to the one between the Mammoth and Smelter Company, in none of them, except between Mammoth and the Smelting Company, was there an absolute right to cancel on the part of the United States Smelting Company independent of any conditions or reasons?

A. I don't think so.

Q. Isn't that an extremely unusual clause to find in any smelting contract?

A. The Mammoth Copper Mining Company—

Q. (Interrupting.) Please answer the question.

[fol. 632] A. The agreement with the Mammoth Copper Mining Company was not drawn up in the form of a regular contract.

The Master: You are not answering that question responsively. As a man very familiar with these contracts, was that cancellation clause in your contract with the Mammoth Company an unusual one?

The Witness: I don't know of any contracts where that clause is stipulated in regular form.

The Master: You do think that it was an unusual one?

The Witness: Well, I don't consider that that was a regular form of contract. It is unusual for a regular contract.

Q. In the whole course of your experience, excepting this Mammoth and Smelter Company contract, did you ever know of a smelting contract between a producer of ores and the Smelter which contained such a clause?

A. Yes, I have written letters covering the purchase of ores where they had the right to discontinue, or agreed to discontinue receiving ores—that is, in letter form.

Q. Without any conditions?

A. Yes.

Q. With what companies?

A. I don't recall what particular company.

Q. During this period?

A. No, I did not refer to this period.

Q. As a matter of fact, in all these contracts, told and otherwise, that you had during this period covered by these ores in controversy here, the United States Smelting Company after charging against it [fol. 633] all its expenses, overhead, cost of freight and cost of the ores, and everything, made a profit?

A. Yes.

(At this point Mr. Stockton offered certain exhibits to be marked in evidence, the papers to be furnished.)

The Master: I will receive them provisionally as I ruled in respect to all these exhibits. I must find from the evidence, either taken before me or contained in the depositions offered in evidence, that they are adequately connected with the personal knowledge of somebody that lies as the basis of the opinion contained in them.

Q. Did you receive that letter purporting to be a letter of the American Smelting & Refining Company, dated September 30, 1915, to W. H. Eardley, United States Smelting Company, dated September 30, 1915?

A. Yes.

Mr. Stockton: I offer that in evidence.

The Master: I will take it on the same ruling as the last exhibits that were offered.

Papers referred to marked Plaintiff's Exhibit 116 in evidence.

Q. Was this letter received by you in the ordinary course of business?

A. Yes, sir.

Q. And were shipments of residues made under it under the terms set forth in it to the American Smelting and Refining Company?

A. Yes.

Q. Did you receive payments from them upon settlement sheets made in accordance with the terms set forth in this letter, and did you accept those in payment?

A. Yes.

[fol. 634] GEORGE W. METCALF, recalled by Mr. Jerome for further cross examination:

By Mr. Jerome:

Q. Referring to Plaintiff's Exhibit 23, and the settlement sheets thereto attached, will you tell me when those particular settlement sheets attached to that exhibit here in evidence were prepared?

A. Why, to the best of my knowledge, based on my recollection of what was done at that time, those sheets were delivered to the Mammoth Company at Kennett in March or in April, 1916.

Q. That is practically at the entire close—

A. (Interrupting.) I will cut out March; in April or May.

Q. That is at the close of all these transactions that relate to what we might term the Beer-Sondheimer ores?

A. Yes, those particular sheets of paper.

Q. When you received these, did you examine them?

A. Why, I examined them personally in a general way, I did not examine each particular one.

Q. Did you note that in almost every case the shippers' analyses for zinc was lower in percentage than the United States Smelting Company's analyses?

A. What do you mean by in almost every case?

Q. I am taking these settlement sheets attached to Plaintiff's Exhibit 23. There are only a very few settlement sheets in which the shippers' analyses for zinc is not smaller in percentage than the United States Smelting Company's analyses for zinc, as for instance, taking the settlement sheet of September 16, 1915, lot No. 51, the [fol. 635] assay of the U. S. S. Company, per cent. zinc is 41.9, while the shipper's assays are 40.9?

A. I might say that during the lunch hour I glanced through these, and my recollection is that there were about ten cases in which the assay there given as a shipper's assay was greater than the settlement assay—eight or ten.

Q. And in how many cases were there where the United States Smelting Company's assay was greater than the shipper's assay?

A. I have a memorandum here, which I will count up. I think, I would not be positive about that, but in most of the rest of the settlement assay is greater than the assay shown as the shipper's assay, and I think in one or two they are identical, in certain cases no shippers' assays appear.

Q. How many did you find of these settlement sheets altogether?

A. How many settlement sheets?

Q. Yes, in Exhibit 23?

A. I think it is 106.

The Master: On that Exhibit 23?

Mr. Jerome: Yes.

Q. And of those there were ten in which the shipper's assay for zinc ore was higher than the Smelting Company's?

A. This memoranda I have just consulted indicates there were nine cases.

Q. How many did you find in which the shippers' were lower than the United States Smelting Company's zinc assay?

A. I am not quite sure whether this memoranda is complete or not. There were about 47 such shown on this memoranda, but I am not quite sure that that is all.

Q. But approximately how many did you find that had no shippers' analyses at all?

[fol. 636] A. Probably about four, I would not be sure. You asked me how many showed no shippers'?

Q. Yes.

A. There would be about 50—40 to 50, something like that.

The Master: Where there is no entry of the shippers' assay?

Mr. Jerome: No, sir.

The Witness: No, sir.

Q. In these settlement sheets, where there was a shipper's assay and a smelting company assay, for which of the zinc contents did the Mammoth Company receive credit—on the basis of which?

A. On the basis of the assays shown on the settlement assay.

Q. Which was invariably in these settlement sheets the assay of the United States Smelting Company?

A. It is invariably the assay given on the settlement sheet—as the settlement assay.

Q. Do you know what these shippers' assays were? Were they assays of Kennett samples, or pulp samples from the smelter?

A. I know in having almost a general knowledge of the case, but not a personal knowledge of just how that sheet was made up. I was not there.

Q. What is your knowledge, your general knowledge of the case?

A. That those assays represent the Kennett assays on the Altoona pulps.

Redirect examination by Mr. Stockton:

Q. Will you state, if you know, how these settlement sheets attached to Exhibit 23, came to be made up in the form *in the form* [fol. 637] which they are now; how those particular ones came to be made up?

A. The first settlement sheets on these zinc ores which we received—which the Mammoth Company received from the United States Smelting Company—gave comparatively little information. I remember distinctly that they gave the zinc analyses, settlement assays, and the final payments, and while I think there was some other information, probably the car number, et cetera, yet not very much more information, and they did not show the details of the calculation by which the amount due was figured, that is my recollection, and that when we came in the earlier part of 1916, to try to prepare a statement of this case for use in a suit, it seemed to me that these typewritten settlement sheets which we had received did not give enough information, and I wrote Mr. Eardley at that time asking him to send me additional settlement sheets showing the same information that was on these first settlement sheets, and such other information about the lots of ore as he had, and in response to that letter he sent me these settlement sheets that are now attached to these Exhibits 21, 16 and 23, and the time when these were received, I can place it exactly—that it was in the first half of 1916. In this connection I would like to explain some testimony I gave the other day that might be misleading. I stated the other day that I had directed Mr. Rix, in making up this Exhibit 23 to use exclusively the Kansas City weights and assays, and I thought he had done that in all but a few cases, but since then, on comparing various of the exhibits, and in particular on examining a copy of a letter from [fol. 638] Mr. Rix to myself, which I found, I found that when he prepared the hypothetical settlement sheets in Exhibit 23, he did not have the Altoona returns for gold, silver and copper, and therefore used the Kennett figures for gold, silver and copper, as set out in the 25 series exhibits.

Mr. Jerome: In the series of Plaintiff's Exhibit 25?

The Witness: Yes.

Q. Mr. Jerome called your attention to the fact that a large number of the United States Smelting Company's settlement sheets in Plaintiff's Exhibit 23 show that the United States Smelting Company assay and the settlement assay was higher than the shippers' assay. Will you state whether the fact that the settlement assay was higher than the shippers' assay has increased or decreased the amount of damages that would be due from Beer, Sondheimer & Co.?

A. The higher the settlement assay for zinc, other things being equal, the less would be our claim against Beer, Sondheimer & Co.?

Q. That is, on a certain shipment lot having a certain percentage of zinc ore?

A. Yes.

Q. (Continuing) Shipped on a certain date when the zinc spelter market had reached any particular figure, would mean that the

damages would be smaller, the higher the amount of zinc percentage in that shipment?

A. Well, the question of Spelter quotations for zinc does not come into that at all, has no effect. Perhaps I had better go on and explain just how that is.

[fol. 639] Q. Go ahead.

A. The Beer-Sondheimer contract provided a base price of \$19 for 40 per cent. zinc per ton. The U. S. S. Company contract provided a base price of \$18 per ton for 40 per cent. zinc. As the percentage of zinc in the ore went up under the Beer-Sondheimer contract above 40 per cent., under the Beer-Sondheimer contract the payments would be increased by one dollar per ton.

Q. For every increase of how much?

A. For every increase of one per cent. in the analysis, whereas under the United States Smelting Company contract the amount received would be increased by \$1.50 per ton for every one per cent. increase in the analyses of the ore for zinc. That is to say, the higher the analyses for zinc, for every such one per cent increase in analyses in zinc, the difference between the returns under the Beer-Sondheimer contract and the United States Company contract would be reduced that fifty cents per ton.

Mr. Jerome: Is that true if the market price was above eleven cents?

The Witness: The market price of zinc does not cut any figure at all.

Mr. Stockton: Answer his question.

The Witness: Yes, that is true.

Mr. Jerome: If zinc was selling at 18 cents a pound, the statements you have made now would apply exactly if selling below eleven cents under the two contracts?

The Witness: If you consider the same price of zinc in both cases.

Mr. Jerome: That is, if you sent a ton of zinc ore, according to the specifications of the Beer-Sondheimer contract, at the time [fol. 640] when zinc was selling at 18 cents a pound to the United States Smelting Company, and had sent a ton at the same time of the same quality of ore under the Beer-Sondheimer contract to Beer-Sondheimer and had been accepted, does your statement hold good in such a case—the price of zinc being 18 cents?

The Witness: That question does not exactly apply. What I was testifying to, was the difference that would be made by an increase or decrease in the analysis of ore for zinc.

The Master: I understand your testimony is based on this: That anything that goes to increase the actual amount that the Mammoth Company got from the Smelting Company under its contract reduces the amount of damage.

The Witness: That is true, but it is not quite all.

Q. Do you mean, Mr. Metcalf, that on any lot of ore that is involved in this suit, that if the assay figure used in the settlement for that lot of ore increased, that it would decrease the damages which were due from Beer, Sondheimer & Company?

A. Providing the same analyses——

Q. (Interrupting) You have got to use the same analyses. There is only one lot; there is just one lot of ore. Take a settlement——

A. You originally confined the question to Exhibit 23, and this last time you include all the ore included in the suit. In exhibit 23 the same analyses for zinc is used both in the hypothetical settlement sheet and in the United States settlement sheets, whereas [fol. 641] in Exhibit 16 and Exhibit 21 it is not.

Q. Take that ore in Exhibit 23 assaying 40 per cent. zinc. If that assay were raised to 41 per cent. would it increase or decrease the damages due from Beer, Sondheimer & Co.?

A. It would decrease the damages due from Beer, Sondheimer & Co.

The Master: Just tell me. By giving Mammoth a greater amount than it would otherwise get?

The Witness: An increase in the zinc analyses of a given lot of ore would increase the amount Beer, Sondheimer & Company should have paid us on that lot of ore by a lesser amount.

Q. By how much?

A. By a lesser amount.

Q. Exactly how much.

A. For a one per cent. raise increase the amount which the United States Smelting Company should have paid the Mammoth Company for the same ore.

The Master: There would be a balance in favor of the Mammoth Company?

The Witness: Yes.

Mr. Jerome: As zinc went up, before it reached 11 cents a pound, the more metal zinc that you had in the ores, you would not have only a proportionate increase—proportionate to the quantity of ores, but if the amount rose—let me put it this way. When zinc was 11 cents a pound under the contract between the Mammoth Company and United States Smelting Company, if you doubled the zinc content [fol. 642] tents you would have doubled the amount of money the Mammoth Company would have received on the zinc?

The Witness: No.

Mr. Jerome: Suppose it was below 40 per cent in zinc, what then?

The Witness: Why, the same condition exists to a more marked extent. If it is below 40 per cent., under the Beer-Sondheimer contract for every one per cent. decrease in zinc analyses in the ore, the price Beer-Sondheimer should have paid us for the ore would be decreased by one dollar per ton, whereas under the United States Smelting Company contract, for every such one per cent. decrease in analyses, the price to be paid would be decreased by \$2 per ton.

Mr. Jerome: Is it your contention that on the figures which we have here on Exhibit 23, that every time, as a basis of settlement between Mammoth and the United States Smelter Company, the higher zinc contents of ore adopted as a basis,—higher than the Kennett settlement—Beer, Sondheimer & Company profited in the matter of reduction of damages?

The Witness: You mean higher than the Kennett assay?

Mr. Jerome: Yes.

The Witness: That is true.

[fol. 643] WALTER H. EARDLEY, recalled:

By Mr. Stockton:

Q. Referring to Plaintiff's Exhibit 116, the letter I offered before, can you state whether the terms given in that letter were the ones which were applied by the American Smelting and Refining Company to the residues shipped for the account of the Mammoth Copper Mining Company?

A. Yes, they were.

26 Liberty Street, October 25, 1920—10:30 a. m.

Met pursuant to adjournment.

Same appearances.

NORMAN J. SIMPSON, a witness called on behalf of the plaintiff, being first duly sworn by the Master, testified as follows:

Direct examination.

By Mr. Stockton:

Q. What is your address?

A. 55 Congress Street.

Q. And your present occupation?

A. Accountant.

Q. By whom are you employed?

A. The United States Smelting, Refining and Mining Company.

Q. Where.

A. At 55 Congress Street, Boston.

Q. Will you state what the accounting system is that is employed by the United States Smelting, Refining and Mining Company [fol. 644] by which the accounts of its various subsidiaries are kept?

A. The accounts are kept at the executive office, and all information is received from the plant offices.

Q. Will you state in what form this information comes?

A. In the form of memorandums.

Q. What are they called; that is, what are the memoranda called?

A. Called memorandums, bills, and we receive other statements—cost statements, etc.

Q. What is done with these memoranda?

A. It is entered on the various books to which it is charged or credited.

Q. Let us have a hypothetical case. If the United States Smelt-

ing Company wished to make payment to the Mammoth Copper Mining Company, how would it be done?

A. The memoranda would be received from the United States Smelting Company, which would be entered on the Smelting Company's books as a credit to the Mammoth Company, and would be also taken in the Mammoth Company's books through inter-company transactions, and a clearance voucher would be made whereby the Smelting Company would pay the Mammoth Company.

The Master:

Q. By the Smelting Company, do you mean the subsidiary?

A. Yes, the United States Smelting Company, a subsidiary.

By Mr. Stockton:

Q. Will you state whether these clearance vouchers that you speak of are numbered or identified in any manner so that there is a [fol. 645] regular sequence of them?

A. Yes, they are numbered.

Q. They are numbered consecutively?

A. They are numbered consecutively.

Q. Are they issued in the order of their numbering?

A. Yes.

Q. Were you asked to go through the files of the United States Smelting, Refining and Mining Company at Boston in order to pick out the clearance vouchers issued in which the United States Smelting Company paid money to the Mammoth Copper Mining Company for the ore involved in the Beer-Sondheimer suit?

A. Yes.

Mr Jerome: You dont mean paid money?

Mr. Stockton: Made payments then.

Q. State at what time you commenced, that is, what date the vouchers show that you started to make your search?

A. About May 1, 1915.

Q. And up to what date, did you make search?

A. Up to October 1st for sure, and a little later than that.

Q. Of what year?

A. 1916.

Q. Did you draw out from the files all the clearing vouchers representing payments by the United States Smelting Company to the Mammoth Copper Mining Company?

A. Yes.

Q. Did these vouchers clearing for those payments have any identifying language or marks on them to show for what ore the payments were being made by the United States Smelting Company?

A. By lot numbers.

[fol. 646] Q. Did they have any other system of identification occasionally?

A. One or two showed certain identifications.

By the Master:

Q. You are testifying about some specific papers. He asks you, I suppose, as to the general course of business.

Mr. Stockton: Yes, the general course of business.

By Mr. Stockton:

Q. I want to know how you know on examining these clearing vouchers that they refer to the ore which is in suit here?

A. I was told the date on which the ore was shipped from the Mammoth to the smelter—to the zinc smelters.

By the Master:

Q. You say you were told; told by whom?

A. By Mr. Metcalf.

By Mr. Stockton:

Q. Were you advised as to the car numbers in which a shipment was made?

A. Yes, the memoranda showed the car numbers.

Q. Were you advised of the cars which contained the ore which is in suit here?

A. I was advised of the lots—by lots.

Q. Was there made up a statement showing the clearing account vouchers covering payments by the United States Smelting Com-[fol. 647] pany to the Mammoth Copper Mining Company for ore included in the Beer-Sondheimer suit?

A. Yes.

Q. Did you check that statement over against the original vouchers?

A. Yes.

Q. And that statement is correct?

A. Yes.

Mr. Stockton: I ask that this paper be marked for identification. The Master: What is the name of this paper?

Mr. Stockton: A statement of the clearing account vouchers covering payments by the United States Smelting Company to the Mammoth Copper Mining Company.

Paper referred to marked Plaintiff's Exhibit 117 for identification.

Q. Have you with you the vouchers which are enumerated in that statement?

A. Yes.

Q. Will you produce them, please?

A. (Witness produces papers.)

Mr. Stockton: I ask that these papers be marked for identification.

Papers referred to, consisting of several packages of clearing account vouchers, marked Plaintiff's Exhibit 118 for identification.

Q. In the ordinary course of business, do you attach to the clearing account vouchers issued by the United States Smelting Company any supporting papers?

A. Yes.

[fol. 648] Q. What ones?

A. The memoranda sent from the office—from the plant office.

Q. Of the subsidiary company?

A. Of the subsidiary company.

Q. Are those memoranda attached to these vouchers in every case?

A. Yes.

Q. Do these vouchers represent payments in some cases which are not connected with the ore in suit?

A. Yes.

Q. Have you made a separation in the statement, Plaintiff's Exhibit 117 for identification, showing the amount of the vouchers which is applicable to the ore in suit, and the amount which is not applicable to the ore sold under the terms of the Beer-Sondheimer contract?

A. Yes.

Q. In the first column, headed "Clearing Account Voucher Number," what do the figures "J-6808" represent?

A. The voucher number.

Q. That represents the consecutive number by which your vouchers are identified?

A. Yes.

By the Master:

Q. That is true of all the entries under that column headed "Clearing Account Voucher Number"?

A. Yes.

By Mr. Stockton:

Q. In the next column, under the heading "Gross Amount" "Credit to M. C. M. Co.," what do the figures \$40,219.55 represent?

A. That is the total amount of the clearance.

[fol. 649] By the Master:

Q. Do you mean to cover every figure in that column by that explanation?

A. Yes.

By Mr. Stockton:

Q. In this explanation, you cover all the figures under that particular column, do you not?

A. Yes.

Q. In the next column, "Gross Amount," "Debit to M. C. M. Co." appear the figures lower down the page, \$19,456.37. What does that represent?

A. That is the total amount of the voucher also.

Q. Does that represent a debit, a payment by the Mammoth Copper Mining Company—does that represent a deduction by the United States Smelting Company from the amount to be paid the Mammoth Company?

A. No. It represents a payment by the Mammoth Copper Mining Company to the United States Smelting Company.

Q. Represented by voucher J-6590?

A. Yes.

Q. Under the column headed "Amount applicable to ore in suit" "Credit to M. C. M. Co.," appear the figures \$39,300.14. What does that represent?

A. That is the amount paid by the United States Smelting Company to the Mammoth Copper Mining Company for the amount—for the value of the ores that is involved in the suit.

Q. Under the succeeding column "Amount applicable to ore in suit" "Debit to M. C. M. Co.," there appears at the top—there appears following the figures relating to voucher No. J-6508, no entry. State what that indicates?

A. There were no charges by the Smelting Company to the [fol. 650] Mammoth Company on that specific voucher.

Q. Was it customary sometimes to have on one voucher both a credit charge and a debit charge?

A. Yes, sir.

Q. Following that column, will you explain what the letters under the column "issued by" represent?

A. That is the Kansas City office.

Q. Where the letters "S. L." appear, what does that indicate?

A. The Salt Lake office.

Q. Of what company?

A. The United States Smelting Company.

Q. Both of the United States Smelting Company?

A. Yes.

Q. Under the heading "Date" appear 9-10-15. What does that indicate?

A. That is the date of the invoice.

The Master: The day of the month and year, you mean?

The Witness: Yes.

Q. The date of the credit memoranda?

A. Yes, the date of the credit memoranda; the invoice.

Q. Under the column headed "Credit to M. C. M. Co." appear the figures \$35,371.46? What do those figures represent?

A. Represents the amount due on certain lots that is involved in this suit.

Q. Does that represent the total amount credited to the Mammoth Copper Mining Company upon that particular credit memorandum dated 9-10-15?

A. Yes.

Q. Under the following column "Debit to M. C. M. Co.," appear no figures opposite the entries relating to credit memorandum, [fol. 651] date 9-10-15. What does that represent?

A. There were no deductions on that lot.

The Master: You mean on any of the transactions where that is blank under that column, do you?

The Witness: Yes.

Q. Under the column headed "Items not applicable" "Credit to M. C. M. Co.," appear \$548.91. What does that indicate?

A. That was a payment made by the United States Smelting Company to Mammoth that was not applicable to the suit.

Q. Do the figures \$548.91 represent that part of the amount covered by clearing account voucher No. J-6808 which was credited to the account of the Mammoth Copper Mining Company for items not included in the present suit?

A. Yes.

Q. And under the succeeding column "Items not applicable" "Debit to M. C. M. Co." there appear no entries with relation to the clearing account voucher J-6808. What does that indicate.

A. There were no deductions.

Q. Under the column headed "Notes," what do the entries there indicate?

A. That shows the lot numbers and various other things that were involved in this suit; also that are not involved in this suit covered by these vouchers and credit memoranda.

Q. Have you included under the column "Notes" an explanation of the entries under the column headed "Items not applicable" "Credit to M. C. M. Co."?

A. Yes. Lot 2—Fines.

The Master: You say Lot 2—Fines—

[fol. 652] The Witness: That is not included in this suit.

Q. In cases where the credit memoranda from the Smelting Company did not know the lot numbers for which credit was being given to the Mammoth Company, did they show the car numbers?

A. Yes.

Q. From those car numbers, with the help of Mr. Metcalf you identified the lot number?

A. Yes.

Q. And which you have entered here under the column headed "Notes"?

A. Yes.

The Master: Tell us, with reference to the first entry there under the column "Notes" "Lot 2—Fines" not included in the suit, how you were informed that Lot 2—Fines was not included in the suit?

The Witness: By Mr. Metcalf.

By the Master:

Q. Have you got voucher 6808 before you?

A. Yes.

Q. Is there anything upon the original memoranda there that gives you any information about Lot 2—Fines?

A. It simply states account number, and Lot 2, and the amount.

Q. And you depended on Mr. Metcalf's statement for information that Lot 2—Fines was not included in this action, did you?

A. Yes, and that he stated it.

Q. You depend upon what he told you?

A. Yes.

By Mr. Stockton:

[fol. 653] Q. Mr. Simpson, I notice that there are three lines of entries under the column headed "Based on Credit Memo." "Issued by" at the top of the page. With reference to credit memoranda dated 9/10/15, 9/10/15 and 9/11/15, were all those credit memoranda combined in the clearing account voucher which was issued at the Boston office?

A. Yes.

Q. On the pages of this statement, do the clearing account vouchers whose numbers are shown on the extreme left hand side of the page cover all the credit memoranda appearing opposite them down to the line of the succeeding clearing account voucher number?

A. Yes.

Q. In other words, in order to show the first clearing account voucher J—6808 you combined the first three credit memoranda?

A. Yes.

Q. And to show the succeeding clearing account voucher J—6590, you combined the next five debit memoranda?

A. Yes.

Q. Wherever debits appear under the column headed "Debit M. C. M. Co.," have you explained the nature of the debit writings under the column headed "Notes."

A. Yes.

Q. Will you produce clearing account voucher No. J—6808?

A. (Witness produces paper.)

Q. Is there attached to this voucher the credit memorandum from the United States Smelting Company?

A. Yes.

Q. Take the credit memorandum dated September 10, 1915. Does it show the lot numbers and the car numbers?

A. Yes.

Q. (Continuing:) For the ore for which payment was being made?

A. Yes.

[fol. 654] The Master: For the ore included in the memoranda?

Mr. Stockton: Yes. For the ore included in the memorandum.

Q. With reference to this \$548.91, which you have under the column "Items not applicable" "Credit to M. C. M. Co." does anything appear on the credit voucher issued by the United States Smelting Company September 10, 1915, which indicates—did anything appear at the time you received it, that voucher, which indicates that that amount does not apply to the ore in suit?

A. No.

Q. How did you ascertain that that amount did not apply to the ore in suit?

A. From Mr. Metcalf.

Q. And wherever you have made such deductions from the total amount of the credit memorandum because of the fact that credit was given for ore not involved in this suit, did you do so upon information received from Mr. Metcalf?

A. In most cases.

Q. Were there any other cases you can remember?

A. The cases where I knew myself that the items were not involved in the suit.

Q. How would you know yourself?

A. From the traffic manager's expenses, etc., that were cleared on the same voucher.

Q. The voucher on its face showed that it did not apply to the ore in suit?

A. Yes. The memoranda.

Q. Will you find clearing account voucher J—6590. Are there attached to this clearing account voucher debit memoranda from the United States Smelting Company to the Mammoth Copper Mining Company?

A. Yes.

[fol. 655] Q. Do these debit memoranda show on their face the reasons for making such debits?

A. Yes.

Q. For instance: Will you read any notations showing the reason for making the debit of \$17,798.81 shown on voucher dated 5/31/15.

A. The freight charges on the Mammoth zinc ore from Kennett to Bartlesville and paid by the treasurer of the M. K. & T. Railroad at St. Louis.

Mr. Tibbetts: By or to?

The Witness: Paid to the treasurer.

Q. Does it contain any other items?

A. Yes, the cost of telegrams in connection with the above \$6.54.

Q. Any other items?

A. For amount paid O. O. Mitchem for unloading of Kennett ores at Bartlesville, \$217.

Q. Mr. Simpson, does the United States Smelting Refining and Mining Company keep a cash book?

A. Yes.

Q. Does this cash book have various divisions for the various subsidiary companies of the parent company?

A. Yes.

Q. Do you have a subdivision for the Mammoth Copper Mining Company?

A. Yes.

Q. And one for the United States Smelting Company?

A. Yes.

Q. Where a clearing account voucher was to be issued, as in the case of clearing account voucher J—6808, will you state what entries would be made in this cash book?

A. There would be a credit under the column of the Mammoth Copper Mining Company, giving the voucher number, and the amount of the payment involved.

[fol. 656] Q. Would any entries be made in the United States Smelting Company subdivision?

A. That is entered in the cash payment book.

Q. Can you state of your own personal knowledge whether all the entries appearing on the clearing house vouchers enumerated in Plaintiff's Exhibit 117 for identification are entered in the cash book of the United States Smelting Company?

A. Yes.

Q. And all the credits which are enumerated in this Plaintiff's Exhibit 117 are credited to the account of the Mammoth Company?

A. In this book, yes.

Q. And all the debits are credited to the account of the United States Smelting Company?

A. Yes.

Q. Will you state what the last page of this Exhibit 117 represents?

A. It shows the voucher numbers, and the lot numbers, involved in the suit, and also the voucher numbers that are only parts of the amounts involved in the suit.

Q. Does it show the vouchers by which payment was made by the United States Smelting Company to the Mammoth Copper Mining Company for the various lots of ore included in this suit?

A. Yes.

Q. And where under the column headed "Ore shipped from Bartlesville to Altoona," "Altoona Lot Number," the figure "1" appears, what does that represent?

A. That is the lot number that is given on the first car that was shipped to Altoona on the ore involved in this suit.

Q. Can you state whether under that column the entries apply only to the ore which was shipped from Bartlesville to Altoona?

A. Yes.

Q. Under the succeeding column entitled "Ore shipped from [fol. 657] Kennett to Altoona and Iola," "Lot Number," the figure "1" appears. What does that represent?

A. The first lot shipped.

Q. The shipment lot number?

A. Yes.

The Master: Are the vouchers enumerated on this last page those that are analyzed on the preceding pages of this complication?

The Witness: Yes.

Mr. Stockton: I offer in evidence the vouchers, being Plaintiff's Exhibit 118 for identification, and Plaintiff's Schedule, Exhibit 117.

Mr. Jerome: Objected to as incompetent, no proper foundation having been laid for their admission.

The Master: Do you require the production of the original books from which they are made up?

Mr. Jerome: These vouchers are not made from any books. This is a compilation, as understand it. Let me ask him a question (refers to Ex. 117).

By Mr. Jerome:

Q. As I understand it, Plaintiff's Exhibit 117 for Identification is nothing more than a tabulation of the facts, the data, and figures, continued in Plaintiff's Exhibit 118 for Identification; is that correct?

A. Yes.

The Master: Supplemented by certain oral information from Mr. Metcalf?

The Witness: Yes.

[fol. 658] The Master: I overrule the objection and take them, the vouchers, as the original documents that they purport to be. I will receive the compilation as a part of this witness' testimony subject to proof by Mr. Metcalf of the correctness of the information that he gave the witness upon which the witness acted.

Mr. Jerome: And to the ruling of the Master so far as it admits Exhibit 118 for Identification in evidence, the defendants except.

The Master: I accept those vouchers as original documents showing just what appears on the face of them. I accept them as documents prepared in the course of business in relation to these transactions, but not necessarily as proof of any of the facts stated in them.

Exhibits 117 and 188 for identification marked in evidence.

By Mr. Stockton:

Q. Does Exhibit 117 contain a statement of all the vouchers which you found applied to the ore in suit?

A. Yes.

Mr. Stockton: That is all.

Cross-examination.

By Mr. Jerome:

Q. Your books of the United States Smelting, Mining and Refining Company show that it is the owner of all the stock of the United States Smelting Company and of the Mammoth Copper [fol. 659] Mining Company, except that there may be some very small number of qualifying shares—the books show that, don't they?

A. I did not handle the books of the United States Smelting, Refining and Mining Company.

Q. What books were you on?

A. The Mammoth Copper Mining Company and the United States Smelting Company.

Q. This Exhibit 117, of the facts therein entered you have no

personal knowledge of, have you? You simply took them from other documents, namely, the documents in Plaintiff's Exhibit 118, and oral information furnished you by Mr. Metcalf?

A. Yes, sir.

Q. In the inter-corporate relations of the United States Smelting Company and the Mammoth Company, are there any actual cash—does any actual cash pass between them?

A. Mr. Laurie will testify as to that.

Q. From the books I mean. Do the books show the actual passage of cash between the two companies?

A. No.

Q. And that is true even when the entries in the books there show that one company is indebted to another or has a credit against the other of these two companies?

A. I don't quite understand the question.

Q. If the books that you kept show that the Mammoth Copper Mining Company has a credit—you balanced your books occasionally, didn't you?

A. Yes.

Q. When you balanced, if your books showed that United States Smelting Company is indebted to the Mammoth Copper Mining [fol. 660] Company at the time of the balancing of those books, in those circumstances did cash money, as far as the books would show, pass between the two companies?

A. I think Mr. Laurie would testify to that clearer than I would.

Q. I am asking you as to what your books showed. You were on the Smelting Company's books, and on the Mammoth Company's books. Do the books of these two corporations when balanced, and one corporation is shown to be indebted to another, is there anything on the books of those two corporations that indicates that that indebtedness in any case is ever settled by an actual cash payment as between the corporations?

A. They show that they are settled by clearance vouchers.

Q. You have books that show something was paid,, money, real money, independent of credit and debit items?

A. Yes.

Q. Do those books show a real money transaction between these corporations? Do they in any case indicate that a debit of one corporation is settled by a cash payment to the other corporation?

A. Yes, the fiscal agency books, they do.

Q. What fiscal agency?

A. The United States Smelting, Refining and Mining Company.

Q. If it was found when you balanced your books that the United States Smelting Company was indebted in a certain amount to the Mammoth Copper Mining Company, that indebtedness would be settled by the transfer of so much cash to the United States Smelting, Mining and Refining Company?

A. Yes.

Q. So that as one of these companies, whenever one of these companies, so to speak, is long in cash, and in credit as regards the other [fol. 661] company, that balance in favor of the company is settled

by the payment to the United States Smelting, Mining and Refining Company of that debit balance. Is that correct?

A. (Witness hesitates.)

Q. Maybe I can make it a little clearer. Suppose, when you balanced your books, you found that the United States Smelting Company owed the Mammoth Company \$40,000. Would the United States Smelting Company settle that \$40,000 by cash payment to the United States Smelting, Mining and Refining Company?

A. Yes.

Q. Now, does it appear from any books, in any transactions like that, that the United States Smelting, Mining and Refining Company ever paid that \$40,000, or any part of it to the Mammoth Company?

A. (Witness hesitates.)

Q. When the United States Smelters begin indebted, from the balancing of your books, to the Mammoth Copper Mining Company, made a cash payment to the United States Smelting, Mining and Refining Company, does anything appear on the books of the Mammoth Copper Mining Company showing that the United States Smelting, Refining and Mining Company paid that \$40,000 in cash, or any part of it, to the Mammoth Company?

A. Yes.

Q. That is, whenever one company was indebted to the other it would pay the parent company in cash—I mean when you balanced?

A. Mr. Laurie would be better able to answer that.

Q. Do the books show. I am confining all these questions entirely, not to what you may have heard, or any outside matters, but I am confining your attention to the books of these two corporations upon which you worked. Do you know?

A. Yes.

Q. Are you in charge of the books of those two corporations?

A. Yes.

Q. And you know their contents?

A. Yes.

Q. And keep run of them?

A. Yes.

Q. When you balance the books of these two corporations and you find one of them is indebted to the other in a certain amount, is that debtor balance, or that debt, settled by a cash payment to the parent company, by which I mean the United States Mining and Smelting Company?

A. I don't know.

Q. There is nothing in the books to show any cash payment to that company?

A. By clearance vouchers for them.

Q. By cash payment I am talking about?

The Master: He means a draft on a bank, or something of that sort.

The Witness: No.

Q. I misunderstood your previous answer, then. There is nothing in the books of either of these two corporations that show a settlement of the indebtedness of one to the other at the time of balancing their books; a settlement in cash, or by draft or check.

The Master: Confining your answer to the books you kept, and what you know—do these books that you keep show the settlement of balances one way or the other between the United States Smelting Company and the Mammoth Company? Do they show a settlement on their face in any way?

[fol. 663] The Witness: By the term "settlement"—

The Master: He means "payment" as Mr. Jerome puts the question to you—Suppose one company owes the other money, is that entered in your books.

The Witness: Yes.

The Master: And how is the settlement of that balance shown?

The Witness: By a clearance voucher.

The Master: Is it shown in any other way except by clearance voucher?

The Witness: No.

Q. Is there any case as between these two companies when a balance shown in favor of one company was settled by the payment of money, or drafts or checks on banks as shown by the books?

A. You mean by payment, by checks or actual cash?

Q. Yes, drafts, or bills, or gold?

A. No.

Q. What did you mean then in your previous answer when you said there had been settlements in cash through the fiscal agent?

A. That is made through by clearance vouchers.

Q. That is not a cash settlement?

A. Well, we had been talking about cash here, and I took that to be what you meant.

Q. As the result of certain of these sales of ore by the Mammoth Company to the United States Smelting Company—ore involved in the Beer-Sondheimer contract, your books showed that the United States Smelting Company became indebted in quite large sums to the Mammoth Copper Company, did they not?

A. Yes.

Q. Did any of such indebtedness, shown by your books—were any of those settled in any other way except by these clearance memoranda sent to the parent company?

A. Not to my knowledge.

Q. Did the books show that they were?

A. No.

Q. You had books that showed the disposition of the cash of the United States Smelters, didn't you?

A. Yes.

Q. Do those books show the disposition of the cash by the United States Smelters? Did any entry show a payment of cash to the

parent company on account of any of the ores involved in the Beer Sondheimer contract?

A. Will you read the question, please.

(Question read.)

A. Only by clearance voucher.

Q. These books showed the taking in of moneys by the United States Smelting Company, did they not?

A. Yes.

The Master: Do you understand the question? Do these books that you keep there in Boston, the books under your charge, show the receipt of money by the Smelting Company?

The Witness: Yes.

Q. Do those books show that the Smelting Company paid that money, or part of it, to the parent company?

A. Yes.

Q. Did these books show that the Smelting Company received money by reason of the sale of products derived from the Beer-Sondheimer ores?

Mr. Stockton: I object to the question as immaterial and irrelevant.

Objection overruled. Exception.

The Master: He means, do they show entries of the sales by [fol. 665] the Smelting Company of the spelter or zinc made from ores?

The Witness: Yes.

Q. Do they show the payment to the parent company of those moneys received from the sale of that spelter?

A. Do they show—

Q. (Interrupting.) The payment to the parent company by the United States Smelter of the moneys received from the sale of that spelter?

A. Indirectly they do.

Q. So that the money, as far as the books go showed this then: That moneys received by the United States Smelting Company from the sale of the spelter derived from the Beer-Sondheimer ore, was paid to the parent company. Is that correct?

The Master: You said indirectly. What do you mean by indirectly? How did it show?

The Witness: It would not show the sale of this specific ore, because it was not kept separate. It would show the sale of all the spelter derived from—

The Master: Including that derived from the Mammoth Company ore?

The Witness: Yes.

The Master: How do your books show the transmission of the proceeds of those sales to the parent company, if they were transmitted?

The Witness: Through the fiscal agency account.

The Master: Did you keep that?

[fol. 666] The Witness: There is one account in the ledger called the fiscal agency account.

Q. Then the books under your control show a transmission of cash from the United States Smelters to the parent company?

A. Yes.

Q. And a part at least of that cash covered the proceeds received by the United States Smelter from the sale of the zinc contents, spelter content, of what we have called the Beer-Sondheimer ores?

A. Yes.

Q. Now, do the books show in any event a payment in cash or by draft from the United States Smelters to the Mammoth Company on account of the ores in question?

A. I don't quite understand the question.

The Master: He wants to know if the books show that any of this cash received from the United States Smelting Company, was paid as cash to the Mammoth Copper Mining Company?

The Witness: No.

Q. The indebtedness of the United States Smelters to the Mammoth Company for the Beer-Sondheimer ore was settled wholly by means of one of these clearance certificates. Is that right?

A. Yes.

Q. When you balanced the books of these two companies, and United States Smelters appeared to be indebted to the Mammoth Company for a certain part of these Beer-Sondheimer ores, that indebtedness you have said, was settled by one of these clearance memoranda?

A. Yes.

Q. After that indebtedness was settled by that clearance memorandum, [fol. 667] did the books of the Mammoth Company show the receipt in cash from the parent company of that amount or any part of it?

A. Yes.

Q. They showed it in cash?

A. Yes, the fiscal agency account.

Q. It would show that there had been an actual transmission, by a check or a draft, or bills, to the Mammoth Company, or did it simply show a credit on the books of the parent company?

A. It showed a credit.

Q. And nothing more?

A. On the parent company's books.

— It showed a credit and nothing more?

A. On which books?

Q. I am referring specifically to the books of the Mammoth Copper Mining Company. Did they reveal or show in any way the receipt of actual cash on that transaction from the parent company or did they simply show a credit with the parent company for that amount?

A. No. It would show a cash transaction.

The Master: Do you mean by that a transmission of money by draft, or something of that sort, to the Mammoth Company from the parent company.

The Witness: Why that I could not say.

Q. Where was it entered? In the cash book?

A. Yes, in the cash book.

Q. You had an account with a bank, too, didn't you?

A. The parent company had.

Q. Was there any banking account of the Mammoth Copper Mining Company?

A. Not on the Boston books.

Q. Do you mean that the books showed the actual transmission of cash, or do they simply result in the entry of a credit with the parent company?

A. It showed a credit through the bank.

Q. What bank do you mean?

A. Through the bank in which the Smelting and Refining Company deposited.

Q. Where was the main office of the Mammoth Copper Mining Company?

A. Boston.

Q. And did the books show that there had been placed to the credit in some bank in Boston or elsewhere,—to the credit of the Mammoth Copper Mining Company, an amount of money, and that the Mammoth Company could itself draw against that amount?

The Master: Was there any bank account of the Mammoth Company as far as you know kept in Boston?

The Witness: No.

Redirect examination.

By Mr. Stockton:

Q. When payments were made to the United States Smelting Company by some outside corporation or concern which had no connection with the United States Smelting, Refining and Mining Company, what would be done with the checks by which these payments were made?

A. They were turned over to the Smelting, Refining and Mining Company.

Q. Supposing the checks were forwarded initially to the Kansas [fol. 669] City office of the United States Smelting Company, what would the United States Smelting Company do? Tell us exactly what it would do.

A. It would either forward the check or get a draft on the bank at the Kansas office, and forward that draft to the Boston office.

Q. Forward to you at the Boston office?

A. To the cashier,—the treasurer.

Q. What would be done with that check or draft then?

A. It would be deposited.

Q. To whose credit would the actual check be deposited. In whose account would that check be deposited?

A. On the books it would be——

Q. I say in whose account would that be deposited?

A. The Smelting, Refining and Mining Company.

Q. Would there be any entry made on the cash book showing a credit in favor of the United States Smelting Company?

A. Yes.

Q. Would that entry be for the amount of that check?

A. Yes.

Q. When the United States Smelting Company, as the result of its operations incurred expenses, and needed money to conduct its operations, how did it secure it?

A. By draft on the parent company.

Q. On whom would the draft be drawn. First, by whom would that draft be drawn?

A. By the United States Smelting Company.

Q. On whom?

A. On the Smelting, Mining and Refining Company.

Q. For the amount of its expenses?

A. Yes.

Q. And the Smelting, Refining and Mining Company would pay that draft, would it not?

A. Yes.

Q. Would it establish a credit in a local bank out in Kansas City, or with the particular people who were to be paid, for that amount?

A. Yes.

[fol. 670] Q. It would actually pay over that amount of cash?

A. Yes.

Q. Were drafts drawn at any time by the Mammoth Copper Mining Company on the United States Smelting, Refining and Mining Company for its local expenses?

A. Yes.

Q. Did it in fact have a bank account in Kennett, California?

A. Yes.

Q. In the name of the Mammoth Copper Mining Company—in its name?

A. Yes.

Q. And it would secure the funds with which to establish that bank account by drawing drafts upon the United States Smelting, Refining and Mining Company?

A. Yes.

Q. And the amount of those drafts would be debited to the Mammoth Copper Mining Company upon books,—ledgers—which you kept?

A. Yes.

Q. So your books would show cash payments by the United States Smelting, Refining and Mining Company to the Mammoth Company?

A. Yes.

Q. Was the Mammoth Copper Mining Company ultimately dissolved, do you know?

A. Yes.

Q. Do you know whether it liquidated its assets? Do you remember?

A. Yes.

Q. Don't answer unless you do remember. Do you or do you not?

A. No, I could not say truthfully that I remember.

Q. In all cases where the United States Smelting Company sold spelter, you say the checks were deposited in the account of the United States Smelting, Refining and Mining Company?

A. Yes.

Q. And then the United States Smelting, Refining and Mining Company credited the United States Smelting Company with the amount of those checks?

A. Yes.

[fol. 671] Q. And that constituted an account upon which the United States Smelting Company could draw?

A. Yes.

Q. They drew for expenses?

A. Yes.

Q. In the case of a declaration of dividends by the United States Smelting Company, or by the Mammoth Copper Mining Company, can you state how those dividends would be paid?

A. By cash transfer.

Q. How would that transfer be made, as a matter of machinery?

A. By clearance voucher.

Mr. Stockton: That is all.

Redirect examination continued by Mr. Stockton:

Q. Did you keep any statement of accounts in the Boston office by which you calculated them you might call the inventory value of the spelter content in ores as of the date you bought the ore?

A. No.

Q. Had you any data from which you estimated what you call the quotational loss or gain on spelter content in zinc ores produced by the United States Smelting Company?

A. Yes.

Q. Will you state what you mean by that quotational loss or gain?

A. That is the difference between the Engineering and Mining Journal prices at the time of purchase and the actual sales price.

Q. In other words, at the time you bought spelter—at the time you obtained ore the spelter in it would have a certain hypothetical value according to the quotations from the Engineering and Mining Journal?

A. Yes.

[fol. 672] Q. And afterward when you sold the spelter recovered from the ore you could figure out the difference between the amount

received from that spelter and the amount of that hypothetical value at the time of the purchase of the ore?

A. Yes.

Q. In figuring out the difference, what you call a quotational loss or gain, will you state how you computed it?

A. That was the loss or gain derived,—the difference between the spelter taken in,—treated—

Q. (Interrupting.) The total spelter treated?

A. Yes, and when actually sold.

Q. Does it represent the difference between the total of that hypothetical value of the spelter treated during this period and the total amount realized from sales?

A. Yes.

Q. Is this the schedule, or statement, made up by you?

A. Yes.

Mr. Stockton: I ask that it be marked for Identification.

Paper referred to marked Plaintiff's Exhibit 119 for Identification.

Q. What do the figures in red ink indicate on this?

A. Losses.

Q. For instance, taking the figure, \$122,202.30, at the head of the column entitled "Quotational Loss or Gain," these figures in red ink, does it mean that upon the 19,739 tons treated at Altoona up to December, 1915, you realized \$122,202.30 less than the hypothetical value of the ore was on the date of purchase?

Mr. Jerome: That question is objectionable.

[fol. 673] Q. Did you keep a record at Boston of the amount of ore treated by the United States Smelting Company at its Altoona smelter?

A. Yes.

The Master: That, he kept, as I assume, on communications received from Altoona?

Mr. Stockton: Yes.

Q. And was that record based on communications received from Altoona?

A. Yes.

Q. And did you keep a record of the amount of spelter produced during the period up to December, 1915, at the Altoona smelter?

A. Yes.

Q. And those reports were made to you in the ordinary course of business?

A. Yes.

Q. Did you keep a record of the hypothetical value of the spelter in the ore produced by the United States Smelting Company computed upon a basis of the Engineering & Mining Journal spelter price at the time the ore was purchased?

The Master: Can you answer that question?

The Witness: No.

Q. Did you compute the value of the spelter which your records showed was produced at the Altoona smelter up to December, 1915, upon the basis of the Engineering & Mining Journal price at the time the ore was bought from which that spelter was produced?

A. I computed it from the records at the office.

Q. Did you compare the value of that spelter produced during that period upon the basis of the Engineering and Mining Journal [fol. 674] prices at the time the ore was bought with the actual amount that was received upon the sale of that spelter?

A. No.

Q. What did you compare? Did you make any comparison between that value based upon the E. & M. J. price at the time the ore was bought and any other value?

A. No. I simply took this statement and compiled this statement, Exhibit 119 for identification, from records——

Q. (Interrupting.) Tell me how you compiled that statement exactly?

A. From our cost statements which are made up at the smelter office.

Q. And what did those cost statements show?

A. They showed these figures here, that I have here.

The Master: You mentioned the other figures.

A. (Continuing:) It shows the tonnage treated, the percentage recovered, and the quotational loss or gain.

Q. Those cost figures show the quotational loss or gain?

A. Yes.

Q. You don't know exactly how they arrived at the quotational loss or gain. You merely took the figures reported to you?

A. Yes.

Q. Did you testify you took these figures from cost statements made to you by the local plant office?

A. Yes.

Re-recross-examination by Mr. Jerome:

Q. In Boston you kept cost sheets, did you?

A. Yes.

Q. And you have not produced them?

A. No.

[fol. 675] Q. And you have cost sheets covering all this Beer-Sondheimer ore, have you not?

A. It does not say Beer-Sondheimer specifically.

Q. Those cost sheets don't show specifically Beer-Sondheimer ore-recoveries from that, or anything of that kind?

A. Not to my knowledge.

Q. When did you last see those cost sheets?

A. Friday, when I made these statements up.

Q. You made these statements up from the cost sheets?

A. Yes.

Mr. Jerome: Are the cost sheets here?

Mr. Stockton: No.

Q. What do these cost sheets show, exactly show? I do not mean as to these figures, but what in a general way they show, the form—

A. They show the tonnage treated, the spelter recovery, the cost of operations, and the profit from operations, and the quotational loss or gain on the sale.

Q. These cost sheets do show the actual profit derived by the Smelter from its operations during the period covered, do they?

A. Yes.

Q. Apart from any hypothetical stuff of quotational loss or gain, they show the actual net profit, don't they, coming to the Smelter from the treatment of the ores?

A. After all operating and other expenses deducted.

Redirect examination by Mr. Stockton:

Q. Do they show that on any particular lots of ore purchased from various individuals?

A. No.

Q. They showed it by showing a total of all the ore purchased?

A. Yes.

[fol. 676] Q. And all the ore treated?

A. Yes.

Q. And all the spelter sold?

A. Yes.

Q. During a certain period?

A. Yes.

Q. And the cost of operations?

A. Yes.

Q. There is no segregation showing the profit on any particular ore?

Mr. Jerome (interrupting): They show that by their monthly cost sheets?

The Witness: Yes.

By Mr. Jerome:

Q. In making these compilations, why did you omit the item of net profits?

Mr. Stockton: Objected to as calling for a conclusion, irrelevant and immaterial; it is perfectly immaterial.

Mr. Stockton: I will offer it in evidence subject to connection.

Mr. Jerome: I object to the cost sheets being offered in evidence.

Objection sustained. Exception.

JOHN LAURIE, a witness called on behalf of the plaintiff, being first duly sworn by the Master, testified as follows:

Direct examination by Mr. Stockton:

Q. What is your address, Mr. Laurie?

A. 55 Congress Street, Boston.

Q. What is your present occupation?

[fol. 677] A. Comptroller of the United States Smelting, Refining and Mining Company.

Q. Can you state what system was employed by the United States Smelting, Refining and Mining Company in keeping the accounts of its subsidiaries?

A. Each subsidiary company has its own set of books which are kept, each of these sets of books being kept in the Boston office, in the Comptroller's office of the United States Smelting, Refining and Mining Company.

Q. What relation does the United States Smelting, Refining and Mining Company stand in, from an accounting standpoint, to the subsidiaries?

A. It is, in most cases, the fiscal agent for each subsidiary company.

Q. Do the subsidiary companies have any separate bank accounts at Boston?

A. Not in the case of either the Mammoth Copper Mining Company or the United States Smelting Company, while these existed.

Q. Were all payments made to the subsidiary companies deposited with the United States Smelting, Refining and Mining Company?

Mr. Jerome: Objected to as calling for a conclusion.

The Master: He means—what do these subsidiary companies do

A. Yes. All moneys received by the subsidiary companies in Boston were deposited in the bank accounts of the United States Smelting, Refining and Mining Company, and proper credit given simultaneously through the cash books.

[fol. 678] By the Master:

Q. What do these subsidiary companies do with their collections, if any. Did the Smelting Company in the first instance collect some money for sales of spelter, say?

A. In some cases remittances might come direct to the United States Smelting Company.

Q. What did it do with that? Did it keep a bank account in Altoona or anywhere?

A. No. If it came to Altoona, I hardly—Suppose it came to Kansas City, then the check would either be remitted to Boston or exchanged for a New York check, or Boston, the rule being that all moneys must be sent to the head office at Boston.

By Mr. Stockton:

Q. Did the United States Smelting, Refining and Mining Company keep any accounts with its subsidiary companies showing the amounts transmitted to it by them?

Mr. Jerome: That is objectionable.

Q. (Question read.)

A. Yes.

Q. Did the United States Smelting Company, and did the Mammoth Copper Mining Company at various times make deposits of cash with the United States Mining and Refining Company—cash or checks on other banks?

A. Yes, in cases where such checks were remitted either to the Mammoth Copper Company or to the Smelting Company, these checks would be received by the treasurer, who was treasurer of all the companies involved, and these checks would be deposited in the bank [fol. 679] accounts of the Smelting, Refining and Mining Company.

Q. And the Smelting, Refining and Mining Company kept accounts of the amounts received in that manner; kept accounts with the subsidiary companies?

A. Only by record in the general cash book, in which these checks would be credited to the companies for whose account they were received.

Q. And were the amounts credited by the United States Smelting, Refining and Mining Company to the account of the United States Smelting Company subject to drafts by the United States Smelting Company?

A. Yes.

Q. And the checks deposited with the United States Smelting, Refining and Mining Company by the subsidiary companies were always subject to the disposition of the subsidiary companies?

A. They were, yes.

Q. And did the Mammoth Copper Mining Company maintain a local bank account at Kennett?

A. Yes, it did.

Q. And when the Mammoth Copper Mining Company needed money for its Kennett operations, how would it obtain it?

A. In most cases the Mammoth Copper Mining Company at Kennett would draw a voucher draft on the United States Smelting, Refining and Mining Company at Boston payable to the payee—such as any company from whom they bought supplies, etc.—and that voucher draft would come through the banks and be brought up to the treasurer's office of the Smelting, Refining and Mining Company by bank messengers, just as if the Smelting, Refining and Mining Company was a banker, and these drafts—
[fol. 680] Mr. Jerome: Or any other drawee?

The Witness: How do you mean?

Mr. Jerome: As if a draft drawn by me as an individual had been presented.

The Witness: If the Mammoth Copper Mining Company had made a check payable to you, for instance——

Mr. Jerome: If they had drawn on me it would be presented to me by a bank messenger.

The Witness: Yes.

Mr. Jerome: You said just as if they were a bank. You don't mean to make any distinction between any ordinary——

The Witness: No, I don't think there is any distinction there.

The Master: How did they get funds to keep up their bank account at Kennett for paying debts?

The Witness: Take the payroll—my recollection is that Kennett often drew a round sum draft for the payroll some days before the payroll became due and deposited *that* in a bank in Kennett, and later on an exact sum was drawn to make up the exact payroll.

Q. In the case of ores purchased by the United States Smelting Company from other shippers besides the Mammoth Copper Mining Company, how was payment made for these ores?

A. The Salt Lake office of the United States Smelting Company drew voucher drafts on the United States Smelting, Refining and Mining Company fiscal agency at Boston to the credit of the seller [fol. 681] of the ore, and these checks came through the bank, to the cashier of the bank, were presented for payment in Boston, and charged on the what we call the fiscal agency cash book,—were charged to the United States Smelting Company, reducing the fiscal agency balance.

Q. How would those voucher drafts read?

A. My recollection is that they were headed United States Smelting Company, and underneath "Voucher approved." They read very much like checks,—Pay to order of so and so, and at the foot of the draft portion would be "To United States Smelting, Refining and Mining Company, Fiscal Agent, 55 Congress Street, Boston." I think they were called fiscal agents.

Q. Did they call for the payment of cash?

A. Yes.

Q. Those drafts were not sent by the Smelting Company to Boston, but were delivered to the various sellers of the ores in payment for their ores?

A. Yes.

Cross-examination by Mr. Jerome:

Q. The United States Smelting, Refining and Mining Company, which I will indicate as the parent company in my questions—the parent company is not authorized to do a banking business in any way, is it?

A. I believe not.

Q. And does not represent itself, or purport to do a banking business in any way, does it?

A. It does not purport to be a banker.

Q. Or to do a banking business?

A. Not so far as I know; not in the ordinary sense.

Q. When the parent company received in Boston for the account [fol. 682] of one of these subsidiaries—the Mammoth Company or the United States Smelters—checks or cash, they credited that company with that remittance, did they *did* not?

A. Yes.

Q. And they deposited that remittance in their own bank account?

A. Exactly.

Q. And in that way came remittances on some days from Kennett, or Mammoth, and on some days remittances from the United States Smelters, and each remittance would then be deposited in the same bank?

A. Yes.

Q. There would be no segregation of those funds in the bank?

A. No segregation in the bank accounts.

Q. And segregation would be merely by entries in the book accounts?

A. Yes, through the columnar form of cash book, which identified the moneys received as belonging to the different subsidiary companies entitled to these moneys.

Q. So that when these checks were deposited by you—these checks received from these subsidiaries when deposited by the parent bank—by the parent company in its bank, there was no notification to the bank, or nothing in the documents accompanying the deposit, that indicated in any way that those checks were the property of any person other than the parent company?

A. No indication, I understand, to the bank.

Q. And when one of these subsidiaries drew for funds, it drew by voucher drafts?

A. Yes.

Q. Specifying in a general way, at least, the principal things that the checks were to be expended for?

A. Yes. There were other ways in which these moneys would be drawn upon. They were not—that was not the exclusive way of [fol. 683] supplying the subsidiaries with funds. In many cases the treasurer at Boston would draw a voucher check a check on the bank account, which would be charged—for instance, to the Mammoth Company, to pay amounts for which the Mammoth Copper Mining Company was liable and which were payable at the Boston office.

Q. But it was always by this voucher check?

A. Voucher draft or check. There were two different kinds of payment, one used by the branches, and one by the head office.

Q. When it came to the time of declaring dividends upon either the Mammoth stock or the Smelter stock, what would be the procedure in those circumstances?

A. Following a vote by the directors of the subsidiary company for the declaration of dividends, on the date as of which that dividend was payable, a clearing voucher similar to the ones in Exhibit 118—one of these clearing vouchers would be prepared in the Comptroller's office stating dividend declaration by the Mammoth Copper Mining Company on so many shares payable to the United States Smelting, Refining and Mining Company. These voucher drafts would be

entered by the treasurer on the fiscal agency cash books, having the effect of transferring the amount of the dividend from the funds of the Mammoth Copper Mining Company to the funds of the Smelting, Refining and Mining Company, which owned the whole of the stock.

Q. It had the effect simply of making entries showing a difference in the accounts between the two companies?

A. Yes.

Q. But no cash was paid?

A. It depends upon what you mean by cash.

[fol. 684] Q. The draft was not presented to the bank and the funds drawn out and re-deposited?

A. No check on any bank, no, and no actual cash passed; the clearing voucher was equivalent to a check drawn on the fiscal agency.

Q. These drafts that were drawn by these different companies were presented to the parent company in Boston, were they at any stage of their life OK'd or approved by any officer of the parent company in Boston before payment?

A. You are talking just now of the voucher drafts drawn at the branch offices?

Q. Yes.

A. These were not OK'd by any Boston official or officer, but the treasurer's department would look over the drafts presented on it, and reserved the right to repudiate any.

The Master: They satisfied themselves as to the propriety of the expenditure indicated on the voucher?

The Witness: Yes. Of course, the treasurer would pay every voucher approved that came along, and if those vouchers had "Approved" by the managers of the branches before they were issued, they relied on them.

Q. Was that "Approved" by the treasurer in Boston indicated by any notation on the face of the draft?

A. No, not the approval of the treasurer. The highest approval indicated on these drafts would be the approval of the manager, the general manager at the branch office—the plant office of the subsidiary companies.

Q. These cost sheets—

A. (Continuing:) When these voucher drafts were presented they [fol. 685] would come in bunches from the different banks, perhaps a dozen of them, and the treasurer would issue a bank check to cover. For instance: Supposing the First National Bank in Boston sent in a number of vouchers totaling say \$100,000. The treasurer of the United States Smelting, Refining and Mining Company would issue a check to the First National Bank for the \$100,000 to take up these voucher drafts, so in that way I would consider that we accepted the liability.

Q. These would be sight drafts always, would they?

A. Yes, just ordinary common voucher drafts.

Q. The cost sheets covering the period with reference to this suit are still in the possession of the parent company, are they not?

A. Yes.

Q. And they were monthly cost sheets?

A. Yes, sir.

Mr. Jerome: Is there any objection to producing those here?

Mr. Stockton: Yes, there is objection to using those here.

Mr. Jerome: Then we will have to serve notice.

Q. Are they very bulky—these cost sheets?

A. Yes, very bulky.

Q. They are bound with other matters?

A. I think probably the cost sheets of the Kansas business are all bound according to years. I expect in the binder covering the year 1915 for the whole zinc business is represented in that group of properties at Kansas.

[fol. 686] The Master: How many volumes would there be?

The Witness: One volume for each year.

The Master: A volume about the size of the big books that are in evidence here already?

The Witness: They are bigger than those; not so wide.

The Master: Just one volume a year.

Q. The net profits of the Altoona smelter during the period covered by the Beer-Sondheimer contract, have those been computed and kept somewhere of record in your records?

A. The profits for the period of the Beer, Sondheimer contract have not been tabulated separately from the profits as a whole.

Q. Have the profits as a whole during that period been tabulated?

A. The profits have been tabulated monthly, and for yearly periods,—the profits as a whole.

Q. How about furnishing us with those?

A. I would like to state here in connection with the possibility of these cost sheets showing the profits of the Altoona, LaHarpe and Iola plants, that other charges and transactions would have to be taken into account in order to get at the net profits. These sheets would only show the plant profits; you would have to consider such things as depreciation, and a lot of other things; taxes, etc.

Q. You are familiar with the printed reports of the parent company during this period that was placed in evidence on the trial?

A. Yes.

Q. And the statements therein contained are true are they not?

[fol. 687] A. Yes, they are true, but subsequently losses might have been sustained we could not foresee.

Q. The statement that the plants had paid for themselves out of the profits, contained in them, is true, is it not?

A. If that is stated in the annual report, it must be true.

Q. As to the board of directors of the parent company and the subsidiary companies, how much identity was there applied to these subsidiary companies,—I mean simply the Mammoth Company and the United States Smelters?

A. The usual practice was to make the executive,—the individuals who were on the executive committee of the parent company's board

of directors—to make them directors of the subsidiary companies, but sometimes others, like the treasurer,—I think Br. Batchelor was the treasurer of the subsidiary and was also a director of it.

Q. If I understand you right, at this period the executive officers of the parent company constituted at least a majority of the board of directors of both the Mammoth and the Smelting Company?

A. That is my recollection.

Q. Were the executive officers of the parent company of these two subsidiaries the same?

A. For the most part they were.

Q. Those cost sheets show, do they not, the actual cost of treatment per ton of ores in this account?

A. They show the cost of treatment of ores as a whole per ton.

Q. And the average recovery?

A. Yes, I think they do.

Mr. Jerome: That is all.

[fol. 688] GEORGE W. METCALF, recalled, for plaintiff:

Direct examination by Mr. Stockton:

Q. Did you advise Mr. Simpson as to the lot number of the shipment lots Kennett to Bartlesville, and from Kennett to Altoona and Iola which constitute the ore which is involved in this suit?

A. I did.

Q. Did you also advise him of the numbers of the cars in which this ore was shipped from Kennett to Altoona and Iola?

A. I did. In such cases—

Q. (Interrupting:) With some exceptions?

A. With some exceptions.

Q. What were those exceptions?

A. The exceptions were those cases where the credit memoranda attached to the clearance vouchers already showed the lot numbers.

Q. Already showed the lot numbers?

A. Yes.

Q. Did you advise him of the car numbers in which the ore was shipped from Bartlesville to Altoona?

A. I think I did in all cases.

Q. Have you gone over Plaintiff's Exhibit 117?

A. Yes, I have.

Q. In detail?

A. Yes.

Q. Have you examined all the vouchers which Mr. Simpson drew from the files as covering the payments made by the United States Smelting Company to the Mammoth Copper Mining Company, and which are in evidence as Exhibit 118?

A. Yes, I have.

Q. Did you assist Mr. Simpson in segregating the amount of those

[fol. 689] vouchers which are applicable to the ore involved in the suit, and the amounts which are not so applicable?

A. I did.

Q. Are the amounts shown in Exhibit 117 as applicable to the ore involved in this suit the amounts which are properly applicable, to your own personal knowledge?

A. They are all properly so applicable.

The Master: You know they are a correct computation from these original vouchers, Exhibit 118?

The Witness: Yes, I do.

Q. Have you checked up the payments made by means of the vouchers which are in evidence as Plaintiff's Exhibit 118, and which are scheduled in Plaintiff's Exhibit 117, and compared the payments made by means of those vouchers which the settlement sheets sent by the United States Smelting Company to the Mammoth Copper Mining Company showing the amount of ore received by the United States Smelting Company and the amount due to be paid the Mammoth under its contract with the United States Smelting Company?

A. Yes, I have compared them.

Q. Did you find that all the ore for which the United States Smelting Company sent settlement sheets to the Mammoth Company was paid for by means of these voucher drafts in accordance with the terms of the contract between the United States Smelting Company and the Mammoth Copper Mining Company?

A. Why, as to that I have not checked the details of the individual calculations of the different lots of ore. I have made the comparison of the amount which the settlement sheets from the United [fol. 690] States Smelting Company attached to Exhibits 16, 21 and 23 show as the payments made by the United States Smelting Company.

Q. They don't show as payments made; they show as payments due to be made?

A. I think they show as payments made.

Q. All right, go ahead?

A. (Continuing:) With the amounts actually paid by the United States Smelting Company through the Boston office books as shown on these clearance vouchers and attached papers in Plaintiff's Exhibit 118.

Q. Do the totals shown on Plaintiff's Exhibit 117 as paid by the United States Smelting Company to the Mammoth Copper Mining Company for the ore involved in this suit check with the totals shown by the settlement sheets sent by the Smelting Company to the Mammoth Company?

A. In a general way they do, but there are certain small corrections.

Q. What is the general nature of those exceptions?

A. They were certain corrections as to freight made subsequent to the preparation of those settlement sheets shown in Exhibits 16, 21 and 23 which appear in these clearance vouchers, Exhibit 118, and

which do not appear in the settlement sheets in Exhibits 16, 21 and 23.

The Master: I understand from that that the vouchers, Exhibit 118, were made up subsequently to the settlement sheets.

A. (Continuing:) Yes. The settlement sheet was made out in Kansas City, and a copy sent to Kennett—and at the same time a copy,—a credit memoranda sent to Kennett and at the same time [fol. 691] a copy sent to Boston where it formed the basis of the clearing account voucher, necessarily some days subsequent to the preparation of the settlement sheet. Then still later when additional freight had to be paid, or a refund on freight, a credit or debit memorandum was made out for that, and that also was sent to Kennett and Boston, and formed the basis for another clearance voucher.

The Master: These vouchers in Exhibit 118 are a reflection of the character of the statement of account between the Snifelt Company and the Mammoth Company or any other shippers whose transactions appear in the vouchers.

The Witness: Yes, they are.

Cross-examination by Mr. Tibbetts:

Q. Referring to Exhibit 117, the first entry under the column on sheet 1, headed "Notes," reads "Lot 2. Fines not included in suit." Mr. Simpson testified that he received from you the information upon which he based that note. What information did you give him in that respect?

A. I would like to see that.

The Master: Show him that voucher.

Q. It is voucher 6808.

A. I gave him the information that the lot marked 2/730 was not included in the suit.

Q. And you are now referring, are you, to the sheet which forms the first of the bunch of sheets attached to this voucher 6808, and [fol. 692] which is dated Kansas City, Missouri, September 10, 1915?

A. Yes, I am.

Q. And which contains a list of certain lot numbers?

A. Yes.

Q. And you have indicated one, giving its lot number and amount?

A. I did not indicate the amount.

Q. In lead pencil, after that entry, appear the words "Not in suit." Is that your handwriting?

A. No, that is not my handwriting.

Q. Do you know who put that on?

A. I rather think that Mr. Simpson did, but I am not sure.

The Master: After his conversation with you?

The Witness: Yes.

Q. When you advised him that this particular lot was not included in the suit, where did you get the information from?

A. The car number is shown on that sheet; car S. P. 53539, and ore shipped at about that time in that car is not included in the ore on Exhibits 16, 21 and 23, which gives the ore that is included in the suit.

Q. In other words, this particular lot of fines is not a part of the ore,—of the so-called concentrates which were originally included in the exhibits and later eliminated?

A. Not part of them.

Q. Are some of the items which you have now deducted as items not applicable in Exhibit 117 concentrates which were originally included in that claim but have since been withdrawn from the claim?

A. No. The intent of this column,—“Items not applicable” was [fol. 693] to cut items which were not used in the statement of the suit included in Exhibits 16, 21 and 23, but at the time that those exhibits were prepared the concentrates were still left in the suit.

Q. And are they still included in the amounts given as applicable to the ore in suit in Exhibit 117?

A. They are.

The Master: So that for your ultimate figures there would have to be a deduction?

The Witness: Yes.

Q. Are there any instances in these clearing vouchers, Exhibit 118, where neither the lot number nor the car numbers appear on the voucher, or on the sheets attached to the voucher—

A. (Interrupting:) There are no cases where some lot number and some car number does not appear, but there were one or two cases where there were errors in the lot number given, or in the car number given.

Q. In those cases how did you identify the shipments?

A. It differs in different cases. I could not give a general answer to that. In each particular case where such an error appeared, I examined all evidence available, and found out it was the right—

Q. (Interrupting:) You came to the conclusion that the voucher did correspond to the settlement sheet covering a particular car or lot even though it was incorrectly designated on the voucher?

A. Yes.

Redirect examination by Mr. Stockton:

Q. Give us a general idea of how you made in the various cases—[fol. 694] suppose the ore number was wrong, how did you identify it?

A. Well, in the cases where a lot number was wrong, it was generally just a single digit of the numbers, of these digits in the car number that was wrong, and I would note that fact and then note the settlement sheet covering that lot, and note the—

Q. (Interrupting:) What would you note about the settlement sheet?

A. (Continuing:) And I would note the amount of money, and the car number, and the lot number, and also the bill of lading and the car numbers shown there. Between those various things it was generally quite easy to see where the error was.

Mr. Stockton: That is all.

26 Liberty Street, N. Y. City,
Wednesday, December 1st, 1920—10.30 a. m.

Met pursuant to adjournment.

Present: The Master.

Same appearances.

GEORGE W. METCALF (recalled for Plaintiff).

Direct examination by Mr. Stockton:

Q. Have you made a tabulation reconciling the statements in Plaintiff's Exhibit 117 of the amount paid by the United States [fol. 695] Smelting Company to the Mammoth Copper Mining Company through the Boston office of the United States Smelting, Refining and Mining Company with the statement contained in Plaintiff's Exhibit 98, showing a memorandum of the amount claimed to be due from Beer, Sondheimer & Co.?

A. I have.

Q. Will you produce that tabulation (Witness produces paper)?

Mr. Stockton: I offer this in evidence as Plaintiff's Exhibit 120. It is merely a tabulation made from figures already in evidence.

(Paper referred to marked Plaintiff's Exhibit 120, in evidence.)

Q. Did you draw up Plaintiff's Exhibit 98?

A. I did.

Q. In drawing up that Exhibit, I notice that you made certain entries headed "Correction for freight deductions improperly made." Will you state what those entries indicate and why you put them there?

A. You mean in drawing up Exhibit 98?

Q. Yes.

A. Why, in originally preparing the statements of amount due we took the freight rates which would have been charged against us by the railroad company on the basis of the valuation of the ore under the Beer, Sondheimer contract, and deducted that from the gross value of the ore under the Beer, Sondheimer contract to obtain the amount which Beer, Sondheimer should have paid us. But we were subsequently advised that that was an incorrect method of figuring that freight, because the freight——

[fol. 696] Q. (Interrupting.) And what were you advised as to the freight rate?

A. (Continuing:) —and that the freight rate charged against Beer, Sondheimer and the freight rate used in the hypothetical settlement sheets should have been the same as the freight rate which was actually paid by the U. S. Smelting Co. on behalf of the Mammoth. Therefore, the freight charged on both sides of the equation should have been the same.

Mr. Jerome: The freight should have been included?

The Witness: The freight should have been included altogether, and in adding these freight deductions on both sides——

Q. (Interrupting.) Why did you add in those freight deductions?

A. In order to get the question of freight out altogether.

Q. Do these deductions represent the amount which had previously been allowed for freight under the hypothetical damage calculations as to the amount due from Beer, Sondheimer?

A. Why,—on Exhibit 98. Additions were made on both sides of the equation, to eliminate from both sides, and so far as the hypothetical sheets were concerned the deductions that were added in were the freight rates that appeared——

Q. (Interrupting.) The freight charges that appeared?

A. Yes.

Q. You really added to the amount shown in Plaintiff's Exhibits 16, 21 and 23, the amount of the hypothetical freight charges which had been deducted in those Exhibits?

A. On the hypothetical sheets and on the—yes.

[fol. 697] Q. In the case of the payments by the United States Smelting Company, you added to the amounts paid by the United States Smelting Company the amounts paid for freight?

A. Yes, that is correct.

Q. Because when the United States Smelting Company remitted to you they deducted the freight which they had paid on the shipments?

A. That is correct.

Q. Have you made up a calculation showing how you arrived at the amount which you deducted for concentrates improperly included in the Plaintiff's original claim?

A. Yes, I have (paper produced by witness).

Mr. Stockton: I ask that it be marked for Identification.

(Paper referred to marked Plaintiff's Exhibit 121 for Identification.)

Mr. Stockton: Mr. Metcalf, will you explain how you made the calculations on Plaintiff's Exhibit 121, for Identification?

The Witness: To explain this it would be best to take up one particular lot, and show how it was done on that lot.

Q. All right, go ahead.

A. The actual calculations for each particular lot are shown on the sheets succeeding the first sheet, the first sheet being a summary.

Q. How did you find out what lots contained the concentrates for which you are now making deductions?

A. By reference to the assay calculation sheets that are in evidence. I think the number is 25-1 and following, which show the com-[fol. 698] position of each particular lot shipped from Kennett to Altoona, and included in Exhibit 23.

Q. Are those the sheets which we call the shipment sheets?

A. Yes, I think they were called shipment sheets.

Q. Do those sheets show the composition of the various shipment lots?

A. Yes, they do.

Q. Is there data in those sheets which shows whether the ore which was shipped was concentrates or crude zinc ore that came within the meaning of the contract?

A. Yes, there was such data.

Q. What figures or data did you consider indicated that the ore should not be included within this suit?

A. Where the particular ore was marked "J. P.," standing for jig product, or "M." or possible "mdl.," some times standing for middlings—

Q. (Interrupting.) Did you make a computation for each of those shipment lots containing either jig products or middlings to show the effect of the inclusion of those ores in the damages in this suit?

A. Yes. Just what I did was to take each of those lots and see how much ore included in that lot was applicable for shipment to Beer, Sondheimer under the contract. I then calculated what should have been paid us by Beer, Sondheimer under the contract for ore, and what would have been paid us by the United States Smelting Company under our contract with them for that ore, subtracted the latter of those two figures from the first, giving the net amount of deduction.

Q. What did that net amount represent?

A. That represented the—in applying this I applied it a little different from that; that is, I took the amount which—

[fol. 699] Q. (Interrupting.) Take one of those sheets—

A. (Interrupting.) Just a minute. I took the amount which we originally figured Beer, Sondheimer should have paid us for that shipment lot and subtracted from it the amount they should have paid us on the portion of that lot which is really applicable to that contract, getting a figure which was a proper deduction from the total gross amount that Beer, Sondheimer should have paid us, and in the same way—

The Master (interrupting): That remainder represented the concentrates.

A. Yes, the remainder constituted the concentrates. And in the same way I took the amount which the United States Smelting Company actually did pay for us for the shipment lot and subtracted from that the amount which they would have paid us under our contract with them for the part of that lot which was applicable to the Beer, Sondheimer contract.

The Master: The United States Smelting Company paid you both for the concentrates and the other,—the contract ore.

3
7
5

The Witness: Yes, they did; and by making that subtraction I obtained the figure which was a proper deduction from the total amount which the United States Smelting Company paid us for the ore.

Mr. Jerome: In other words, you obtained the amount you charged against Beer, Sondheimer in the one case for concentrates, and in the other the charge against the Smelting Company for the concentrates.

The Witness: That is correct.

[fol. 700] Q. What did you do with this amount you received,—the difference of those two figures.

A. I added all the deductions from the Beer, Sondheimer settlements together, and added all the deductions from the United States Smelting Company settlement together, and deducted those sums respectively from the total amount that we claimed Beer, Sondheimer & Company should have paid us, and from the total amount that was actually paid us by the United States Smelting Company.

Q. How did you arrive at the figure \$23,754.53 shown on Plaintiff's Exhibit 98 as a deduction for concentrates under Plaintiff's Exhibit 23?

A. That is the sum of the deductions from Beer, Sondheimer settlements on each of the individual lots containing any concentrates as shown in the third column of the first page of this Exhibit 121.

Q. And the entry, deduction for concentrates \$9,680.09 shown lower down on Plaintiff's Exhibit 98, what does that represent?

A. That is the sum of the amounts paid for those concentrates by the United States Smelting Company and is shown in the fifth column of the first page of Exhibit 121 for Identification.

Q. And how did you obtain the item \$945.53 on Plaintiff's Exhibit 98 under the heading "Deduction for concentrates under Plaintiff's Exhibit 30 for residues"?

A. That is the sum of the amounts received from the United States Smelting Company for the residues produced from the concentrates previously referred to, and is shown in the seventh column on the first page of Exhibit 121.

Q. Will you explain, briefly, how you made the computations for the deductions on the individual lots containing concentrates, taking for example, the second page of Plaintiff's Exhibit 121 for Identification which reads "Shipment lot 106"?

A. Near the top of this page I show the composition of this particular shipment lot as shown on Plaintiff's Exhibit 25-1 and following and the analyses of each of the various materials included in that lot. I noted that it contained 22.15 tons of jig product, 3.55 tons of middlings, and 29.3 tons of plant lot 201, the latter being the only part of that lot which was really applicable under the Beer, Sondheimer contract. I then calculated what Beer, Sondheimer should have paid for us for this plant lot 201 under the contract, and found that the total amount they should have paid us for each ton was \$64.81. The dry weight of this plant lot 201 was 29.007

tons. Multiplying that tonnage by the value per ton I get the total amount \$1,879.74 as the amount which Beer, Sondheimer should have paid us for that plant lot 201. The amount calculated on Exhibit 23 as the amount they should have paid us including freight for shipment lot 106 which included some concentrates, as well as the coarse ore of plant lot 201, was \$3,268.55. Subtracting the \$1,879.94 from this figure—

The Master (interrupting): What is that \$1,879.94.

Mr. Jerome: That was the 29.3 tons of ore that really was under the Beer, Sondheimer contract.

A. (Continuing:) Subtracting this \$1,897.94 from this latter figure I obtained \$1,388.41 representing the excess amount that we claimed from Beer, Sondheimer on account of including in the [fol. 702] calculation in Exhibit 23 the concentrates which formed a part of shipment lot 106. Shall I go on through it in the same way?

The Master: Not if each shipment on the paper is analyzed the same way.

A. (Continuing:) I then proceeded to make substantially the same calculations as to the amount which the United States Smelting Company paid the Mammoth Company for the concentrates included in this shipment lot 106. That is, I took first the plant lot 201 which was the only ore in this shipment lot which was really applicable to the contract,—to the Beer, Sondheimer contract. I included—

The Master: By applicable you mean deliverable; what they were to take and pay for?

The Witness: Yes.

A. (Continuing:) I figured that the amount the United States Smelting Company should have paid us for this plant lot 201 was \$38.25 per ton which, on the tonnage of 29.007 tons amounted to \$1,109.51. That payment, however, did not include any payment for the gold, silver and copper in the ore for which a separate payment was made. I calculated this separate payment under the terms on which the United States Smelting Company settled for the residues in such ore, and found that it amounted to \$2.66 per ton of ore, or a total payment for residues of \$77.15. The figure of \$1,388.41 mentioned above, and representing the amount which Exhibit 23 incorrectly contained as a payment for the concentrates included in shipment lot 106 is entered on page 1 of Exhibit 121 in the third column, the top line of figures opposite shipment lot 106. The figure \$1,109.51 calculated as described above representing the amount which the United States Smelting Company would have paid us for the zinc in plant lot 201 I subtracted near the bottom of page 2 from the figure \$1,726.40 which was the amount the United States Smelting Company paid the Mammoth Copper Mining Company for the zinc of shipment lot 106, obtaining

as a result \$616.89 which represents the payment from the United States Smelting Company to the Mammoth Copper Mining Company for the concentrates included in shipment lot 106. This item I entered on the first page of Exhibit 121 in the fifth column opposite the figure 106. The figure \$77.16 calculated as above, representing the payment the United States Smelting Company should have made to the Mammoth Company for plant lot 201, I subtracted from the actual payment made by the United States Smelting Company for the residues produced from shipment lot 106, the figure of that actual payment being \$48.30; that is to say, if the shipment to the United States Smelting Company had contained only plant lot 201 and that the grade of the shipment had not been reduced by mixing with it some lower grade concentrates—as to residues had not been reduced by mixing with it some lower grade concentrates—the payment made by the United States Smelting Company to the Mammoth Company would have been greater than it actually was by \$28.85. Accordingly, I entered this \$28.85 in the eighth column of [fol. 704] page 1 of Exhibit 121 on the top line, the figures opposite shipment lot No. 106 as a minus entry to be offset against other succeeding plus entries.

Q. Did you make the same calculation for the other shipment lots containing concentrates?

A. In substantially the same way, but in certain cases where—

Q. (Interrupting.) Have you made a separate calculation for each shipment lot?

The Master: Let him finish that answer.

A. (Continuing:) But in certain cases where the United States Smelting Company had not paid us,—did not pay us direct for the gold, silver and copper in the ore, but instead of that shipped the residues for the account of the Mammoth Company, I assumed that the payment for residues made by the United States Smelting Company to the Mammoth Company would be at the same rate per ton as was actually made,—as was undertaken to be made by the Beer, Sondheimer Company to the Mammoth Company. A case of this appears on page 3 of Exhibit 121, shipment lot 107.

Q. So, in those cases you assumed there was no damage sustained by the Mammoth Copper Mining Company because of the residues?

A. Yes.

Q. Have you made a separate calculation for each one of the shipment lots which contained concentrates?

A. I have.

Q. And are they included in Plaintiff's Exhibit 121 for Identification?

A. They are.

Q. Did you make a summary,—what is the first—

[fol. 705] The Master (interrupting): He testified the first sheet is a summary of the following sheets annexed to the same exhibit.

Mr. Stockton: That is all right so long as he has done that.

By Mr. Jerome:

Q. Mr. Metcalf, in regard to this Exhibit 121, see if I have a correct understanding of it. You found that in your original computations of liability, claimed liability of Beer, Sondheimer & Company, that you were claiming too large an amount because you had calculated that liability in regard to certain lots by including in that lot the concentrates which should have been excluded?

A. That is correct.

Q. Therefore, you took up and analyzed each lot containing the concentrates and you ascertained how much of the ore in that lot really Beer, Sondheimer ought to have taken?

A. Yes, that is correct.

Q. And then you estimated the value of that ore?

A. Yes.

Q. And you then found you had charged Beer, Sondheimer by including in your first claim an amount that you should have deducted. You then found the amount they should be chargeable with which gave the precise amount, you charged them for concentrates which you ought not to have charged?

A. That is correct.

Q. You took the similar batches of ore which had actually been sent to the Smelting Company and you calculated the value of that ore on your contract with the Smelting Company,—the ore that Beer, [fol. 706] Sondheimer ought to have taken?

A. That is correct.

Q. And then you took the entire value that they paid you for that, and deducted from that ore the value they paid you for the ore Beer, Sondheimer should have taken, which gave the value they were paying you for the concentrate?

A. That is correct.

Q. And that difference on account of the concentrates you allowed Beer, Sondheimer as a deduction?

A. But in the actual use of those figures I applied them in the two computations, instead of subtracting one product from the other.

Q. This was the ultimate outcome of that?

A. Yes.

Q. The ultimate outcome was this. You found you had calculated that Beer, Sondheimer owed you the difference between what you got from the United States Smelting Company, without the concentrates and what you had calculated they ought to have paid you on those lump shipments?

A. Yes.

Q. So, when you finally came down to find out what Beer, Sondheimer owed, what should be deducted from your claim, you deducted what you got from the smelter from what you had previously charged Beer, Sondheimer, and the difference you allowed them as a deduction?

A. That is substantially correct.

Q. In these calculations you have made here, does the element of freight enter at all, or had they been made on the basis that we are promulgating here that freight is not an element in this case?

A. On the basis that freight is not an element.

Q. Were these deductions for concentrates based on the Kennett weights and assays, or on smelter assays and weights?

[fol. 707] A. They were based on Kennett weights and assays.

Q. In Exhibit 23 were not the weights there based on the smelter weights and assays and not the Kennett?

A. I believe that is true, but the only available way of telling what was the weight and what was the assay of these lots of concentrates, and what lots of ore that were shipped with the lots of concentrates, was to take the Kennett figures, because those were all the figures there were.

Q. That is, when you came to ascertain it you became conscious of the fact that there was a larger claim than ought to have been made, and honestly and properly you wanted to make a suitable deduction, and you found yourself confronted with not knowing exactly what that deduction ought to be, and you did it as nearly as you could?

A. Yes, that is correct.

Mr. Stockton: I offer Plaintiff's Exhibit 121 for identification in evidence.

Mr. Jerome: We have no objection to it.

(Paper referred to received in evidence and marked Plaintiff's Exhibit 121.)

By Mr. Stockton:

Q. Did you ever make a comparison of the weights of the ore comprised in Plaintiff's Exhibit 23 as shown by the Kennett figures as compared with that shown by the smelter figures?

A. I think I have made such a comparison, but I have not got it here.

Q. And do you recollect how closely they checked?

A. I think it was quite close, but I could not say off-hand just how [fol. 708] close. I am quite sure it was within less than one per cent.

Mr. Tibbetts: was that comparison based on each shipment or on the total shown on Exhibit 23. You don't mean that under no shipment was there a variation of more than one per cent.

The Witness: I would say that in most shipments there was no variation greater than that, but I would not say that in no shipment—

Mr. Jerome: The aggregate gross weight of ore shipped from Kennett as shown by the figures derived from that source check up within one per cent of the aggregate gross weight of the figures derived from the Altoona sources in Exhibit 23.

The Witness: Altoona and Iola, yes.

Q. There is a note of entry on Plaintiff's Exhibit 98. "Deduction on account of lot 42, less than 33 per cent." (Reading from Exhibit 98.)—\$1,323.46. Was that one of the lots which was

originally shipped to Bartlesville, and dumped there and subsequently sent to Altoona?

A. It was.

Q. How did you arrive at the figure \$1,323.46 representing the deduction from the Mammoth Copper Mining Company claim on account of that lot being less than 33 per cent zinc?

A. That is the figure shown on the hypothetical settlement sheet representing lot 42 in Exhibit 16, for the total value of that lot before deducting any freight.

[fol. 709] Q. Under the Beer, Sondheimer contract?

A. Under the Beer, Sondheimer contract.

Q. I note further on a statement on Plaintiff's Exhibit 98, "Note. A deduction should be applied on account of lot 42, but as this lot was mixed with other ore before reaching Altoona cannot determine exact amount computed for ore by U. S. S. Co." Have you arrived at a method for calculating the amount paid by the United States Smelting Company for this lot 42?

A. I have.

Mr. Stockton: I ask that this paper be marked for identification.

(Paper referred to marked Plaintiff's Exhibit 122 for Identification.)

Q. What theory did you work upon computing the deduction which should be made from the amount paid by the United States Smelting Company?

A. The theory was that if I figured the minimum deduction any error would be in favor of Beer, Sondheimer & Company and against us, and consequently there could be no objection to figuring it in that way.

Q. State first what was the difficulty in computing the deduction for the amount paid by the United States Smelting Company on lot 42?

A. Because lot 42 was unloaded on the ground at Bartlesville, and re-loaded and shipped to Altoona with other ore, so that its identity was lost, and consequently the United States Smelting Company made no specific payment for lot 42, but did pay for the ore of lot 42 along with the other ore that was reloaded and shipped to them from Bartlesville.

Q. How did you figure out the minimum amount paid by the [fol. 710] United States Smelting Company for this lot?

A. The great difficulty was in determining what metal prices would have been applied to this lot 42 by the United States Smelting Company because we could not tell at what date the ore of lot 42 reached them, and the metal price they were to pay for it depended on the day of receipt. So I figured if I took the lowest metal price used by the United States Smelting Company in paying for any of this ore shipped from Bartlesville I would arrive at the minimum figure which they could have paid the Mammoth Company for it, and would thus have a minimum deduction to make from the gross amount which they paid the Mammoth.

Q. Then what did you do?

A. I looked through the settlements of Exhibit 16 which covered all the ore shipped to Altoona from Bartlesville, and picked out the lowest metal price. I found the lowest zinc price to be 12.85 cents per pound as shown in lot 1 as received at Altoona, and I examined the settlement for residues in Exhibit 30 to get the lowest copper and silver prices, and found the lowest copper price to be 15.7 cents per pound as used on lots 43 and 47 in Exhibit 30, and the lowest silver price at 46.625 cents per ounce as used on lot 45 in Exhibit 30. Then using these prices and the analyses of lot 42 as shown on the hypothetical settlement sheet and the contract with the United States Smelting Company as to the terms of payment, I figured that the minimum amount the United States Smelting Company could have paid us for this lot 42 was \$19.10 per ton, or a total of \$1,039.99.

Q. Then, did you make a revised statement of the amount claimed to be due from Beer-Sondheimer Company without interest?

A. I did.

[fol. 711] Mr. Stockton: I offer Plaintiff's Exhibit 122 for Identification in evidence.

Mr. Jerome: No objection.

(Paper referred to marked Plaintiff's Exhibit 122 in evidence.)

Mr. Stockton: I ask that this paper be marked for Identification.

(Paper referred to marked Plaintiff's Exhibit 123 for Identification.)

Q. How does this revised statement of the amount due differ from Plaintiff's Exhibit 98?

A. Only by the deduction of the amount which the United States Smelting Company should have paid the Mammoth Company for lot 42 from the total amount shown on Exhibit 98 as being the amount paid by the United States Smelting Company to the Mammoth Company for the ore of Exhibit 16.

Q. What does this show the revised amount claimed by the plaintiff to be?

A. Applying the deduction for lot 42, increases the total amount of the claim without interest to \$302,305.50 instead of \$301,265.51 as shown on Exhibit 98.

Mr. Stockton: I offer this Plaintiff's Exhibit 123 for Identification in evidence.

Mr. Jerome: No objection.

(Paper referred to marked Plaintiff's Exhibit 123 in evidence.)

Mr. Jerome: I don't suppose any increase will be considered at all. Your claim as filed with the Alien Property Custodian has got to be the measure. You cannot make it larger than that. You claim a certain amount in your original claim. That claim you [fol. 712] put in suit. I don't suppose the Master nor the Court has any right—

The Master (interrupting): The Master's function is just to find out the amount of damages.

Q. Have you made a computation of the amount of interest due on this claim, Mr. Metcalf?

A. I made a computation of the amount of interest due up to April 1, 1920.

Q. Will you state how you calculated the amount of interest due?

A. I figured on each individual lot, and the amount of the interest that could have been earned on the payments from Beer-Sondheimer & Company at six per cent. from a date 61 days after the shipment of that lot, and added all those items of interest to obtain the total amount interest due from Beer-Sondheimer. I then calculated the amount of interest at six per cent. that could have been received on the payment actually received from the United States Smelting Company from the date of the credit memoranda by which the United States Smelting Company gave credit to the Mammoth Company. That calculation is not based on each individual lot, but on each individual credit memorandum. I added those items together to obtain the total amount of interest that could have been earned on the payment from the United States Smelting Company. I then subtracted this latter amount from the amount that could have been earned on the payments from Beer-Sondheimer to obtain a result representing the amount of interest lost by the Mammoth Company on account of Beer-Sondheimer's refusal to accept and pay for the ore.

[fol. 713] Q. Will you state how you arrived at the date of 61 days from the date of shipment in calculating interest?

A. That 61 days is the average of the number of days taken by Beer, Sondheimer, the number of days after shipment of the ore which they actually received and paid for under the contract, and I assumed that if they had continued to receive the ore they would have used approximately the same number of days to make payment.

Q. As a matter of fact did you make a calculation to ascertain the average time that the United States Smelting Company made payment to the Mammoth Copper Mining Company for the ore shipped after the date of the shipments?

A. The average time required by the United States Smelting Company to make payment by credit memoranda for ore shipments from the Mammoth was 50.9 days.

Mr. Stockton: I ask that this be marked for identification.

(Paper referred to marked Plaintiff's Exhibit 124 for identification.)

Mr. Stockton: And I also ask that this be marked for Identification.

(Paper referred to marked Plaintiff's Exhibit 125 for Identification.)

Q. From where did you obtain the figures on Plaintiff's Exhibit 125 for identification, Mr. Metcalf?

A. I obtained the figures as to date of shipment to Beer, Sondheimer & Company as shown on this Exhibit 125 in the second column from the settlement sheets from Beer-Sondheimer and forming part of Exhibit 31, and I obtained the date of the payment received from Beer-Sondheimer from the records of the Boston office [fol. 714] of the United States Smelting, Refining and Mining Company as furnished to me by Mr. Laurie.

Mr. Stockton: I offer that in evidence as Plaintiff's Exhibit 125.
Mr. Jerome: No objection.

(Paper referred to marked Plaintiff's Exhibit 125 in evidence.)

Q. From where did you obtain the figures contained in Plaintiff's Exhibit 124 for Identification?

A. I obtained the dates of the shipments of the several lots of ore to the United States Smelting Company from the United States Smelting Company's settlement sheets attached to Exhibits 16, 21 and 23, and I obtained the date of the credit memoranda by which the payments were made from the records of the Boston office of the United States Smelting Company, these dates being all shown in evidence on Plaintiff's Exhibit 117.

Mr. Stockton: I offer that in evidence.
Mr. Jerome: No objection.

Paper referred to received in evidence and marked Plaintiff's Exhibit 124.

Q. As to the computation of interest did you compute the interest separately upon each shipment lot for the ore contained in Plaintiff's Exhibits 16 and 23 and on each plant lot for the ore contained in Plaintiff's Exhibit 21?

A. Yes, I did.

[fol. 715] Mr. Stockton: I ask that this be marked for identification.

Paper referred marked Plaintiff's Exhibit 126 for identification.

Q. Will you explain what the various columns in this Plaintiff's Exhibit 126 for identification represents?

A. The first column headed "Items affecting interest due from Beer-Sondheimer" includes, on this first page as to each lot, the total amount shown on the hypothetical settlement sheets, as the amount due from Beer-Sondheimer & Company for that lot without deducting any freight. From this amount I deducted an estimate of freight on that lot based on the amount of freight actually paid by the United States Smelting Company for account of the Mammoth Company on all the ore shipped from Kennett to Bartlesville and there unloaded on the ground before the railroad would allow the United States Smelting Company to have that ore picked up and shipped to Altoona.

Q. Do the statements you have just named apply only to the ore

which was shipped to Bartlesville and refused by Beer, Sondheimer & Company?

A. Yes, that general statement applies only—

Q. (Interrupting.) How did you arrive at the freight rate which you applied in making the deductions for freight?

A. I took the total amount which the United States Smelting Company paid to the railroad for all the ore shipped to Bartlesville and unloaded on the ground for the freight from Kennett to Bartlesville and divided that amount by the total tonnage, obtaining thereby the average rate of \$11.949 per ton.

[fol. 716] Q. And you subtracted that figure from what?

A. I subtracted—I just multiplied that average rate by the total tonnage of the individual lot, and subtracted that total from the gross amount shown on the hypothetical settlement sheet as the value of that lot, obtaining thereby a figure representing what Beer, Sondheimer & Company should have paid for the lot, eliminating freight.

Q. What does the next column represent?

A. The next column headed "Sources of items" gives certain explanatory descriptions of the items in the first column, being lot number to Bartlesville, the freight payments, etc.

Q. Does that represent the Kennett shipment lot number?

A. Yes, this represents the Kennett shipment lot numbers.

Q. On page 1 of Plaintiff's Exhibit 126?

A. Yes, on page 1.

Q. What does the next column represent?

A. The next column headed "Date of item," is the date of shipment of the several lots to Beer-Sondheimer & Company at Bartlesville. The next column headed "Date interest should begin" is the date in the column headed "Date of item," plus 61 days. The next column headed "Days elapsing to April 1, 1920" represents the elapsed time from the date given in the column headed "Date interest should begin" up to April 1, 1920, and this date is indicated by the figure four years near the top of the column with differing numbers of days added, a certain number of days being shown as affecting each particular lot.

Q. And the next column?

A. The next column headed "Net amount of item" is the result of subtracting the freight payment from the gross payment in the [fol. 717] first column. The next column on the sheet represents the dollars of interest due at six per cent for the elapsed time shown, that is, up to April 1, 1920.

Q. Will you state why you deducted the amount of the freight paid from Kennett to Bartlesville from the total estimated amount due from Beer, Sondheimer & Company for each shipment?

A. Because the freight rates were identical from Kennett to Altoona, and the simplest way was to eliminate consideration of that freight,—was to eliminate it from both sides of the equation.

Q. Was the freight included in the amount on the first page of Exhibit 126, the freight \$650.13 there,—does that represent freight

included in the sum estimated to be paid by Beer, Sondheimer & Company?

A. The sum from which that \$650.13 is deducted represents the total amount that Beer, Sondheimer should have paid for that particular lot of ore delivered.

Q. What ore was that?

A. Being lot 35 delivered to Bartlesville, and out of that—

Q. (Interrupting.) Does that figure \$1,673.08 appear in any other Exhibit?

A. Yes, that same figure appears on the hypothetical settlement sheet for lot 35 in Exhibit 16.

Q. As what?

A. As the gross amount which Beer, Sondheimer & Company should have paid for that lot of ore before deducting any freight.

Q. Was the same method of operation used in the succeeding pages of this exhibit,—the same method of computation?

A. The same method was used on the succeeding pages so far as they refer to the ore of this Exhibit 16.

[fol. 718] Q. What page refers to that?

A. Pages 1 and 2.

Q. Will you explain if there is any difference in computing the interest on the ore which was put in stock at Kennett, and afterwards shipped to Altoona, which is contained in Plaintiff's Exhibit 21?

A. On page 3 of this Exhibit 126, begins the statement as to the lots put in stock at Kennett and subsequently shipped.

Q. Will you state what the figures in the various columns represent, taking the top figures,—taking the figures at the top of the page for an example.

A. The first column on the pages referring to the ore of Exhibit 21 is left blank, as no alterations were needed to be made in the item taken on which interest should be figured. The second column headed "Sources of items" is the plant lot number, which on this sheet is called "Stock lot number," or the several cars of samples when the ore is described as samples in Exhibit 21. The third column headed "Date of item" is the date when the ore was produced, as shown on the hypothetical settlement sheets attached to Exhibit 21. The fourth column headed "Date interest should begin" shows a date obtained by adding 61 days to the date shown on the third column. The fourth column headed "Days elapsing to April 1, 1920" shows the number of days in addition to four years elapsing in the case of each one of these lots from the date shown in the column headed "Date interest should begin" up to April 1, 1920. The Sixth column headed "Net payment of item" shows the amount shown on the hypothetical settlement sheets for each of the lots included in Exhibit 21 before deducting any freight. The seventh column headed "Interest at six per cent" for days elapsing, shows [fol. 719] the amount of interest for each one of these lots at six per cent from the date interest should begin up to April 1, 1920.

Q. Is there any different method of computation used for the ore contained in Plaintiff's Exhibit 23?

A. I had better first say that the calculations as to the ore of Ex-

hibit 21 continue on through page 4,—are on page 3 and continue on page 4 of this Exhibit 126 about one-half way down the page where begins the calculation of interest on the ore shipped direct to Altoona or Iola as shown on Exhibit 23. The calculations as to ore of Exhibit 23 begins with the line in which the entry in the second column is shipment lot three to Altoona.

Q. Under the column headed "Date of item," following the item that you have just mentioned appear words and figures, July 4. Does that represent the date of shipment?

A. That represents the date of shipments.

Q. And the other figures appearing under that figure have the same significance as they do in the preceding computations, have they?

A. They do on this page number 4 and throughout, but beginning about half way down on page five occurs the calculation of interest on the first lot, which also included concentrates, and on this lot and all other lots including concentrates, I have made a deduction from the total amount on which the interest for each lot was figured to allow for such concentrates.

Q. Whatever deduction you have shown there corresponds with the deductions for concentrates shown on Plaintiff's Exhibit 121?

A. Yes, they do.

Q. And you subtracted from the amount shown in the hypothetical damage sheet in Plaintiff's Exhibit 23, the amount of de-[fol. 720] duction for that particular lot on account of concentrates shown on Plaintiff's Exhibit 121?

A. I did.

Q. And then calculated the interest on the result?

A. In the same way.

Q. Are there any other differences in computations used in the succeeding pages which show the calculation of interest on the amount due from Beer, Sondheimer & Company?

A. There are no other changes in methods, but on page 6 of Exhibit 126, after the calculation of interest on shipment lot 146 to Altoona occurs the calculation of interest on certain items of expense which were paid either by the United States Smelting Company on behalf of the Mammoth Company or by the Mammoth direct, which items would not have been incurred if Beer, Sondheimer & Company had accepted the ore. These items included certain telegrams in regard to getting the ore unloaded, etc., the actual cost of unloading this ore at Bartlesville and re-loading same, certain freight adjustments paid on certain of this ore, and the cost of stocking the ore of Exhibit 21 at Kennett, and subsequently reloading the same for shipment to Altoona.

The Master: Are shown on Exhibit 126?

The Witness: They are.

Q. I notice that in the case of shipment lots 141 to 145, the item affecting interest from Beer, Sondheimer & Company is apparently shown as a total. Will you state why that is done?

A. You misread it. In regard to shipment lots 141 to 144 to Altoona, there is no entry made in the column headed "Item affecting interest due" for the reason that no corrections were necessary on that item, and it was only necessary to show the gross amount of those payments in the column headed "Net payment of item."

Q. Then the purpose of the first column on the left hand side of the sheet in Plaintiff's Exhibit 126 is to show correcting items,—to show corrections which must be made before calculating the amount of interest on the amount shown to be due from Beer, Sondheimer & Company in the hypothetical damage calculations?

A. That is correct. That is, when it was not possible from previous exhibits to take directly the net amount of item on which interest should be calculated, the calculation to obtain that net amount of item was shown in the column headed "Item affecting interest due."

Q. Does Plaintiff's Exhibit 126 for Identification also contain a computation of the interest accruing on the payment by the United States Smelting Company up to April 1, 1920?

A. It does.

Q. Will you state how you made those calculations?

A. The first column on page 7 headed "Date of credit memorandum interest begins" indicates the date of a particular credit memorandum by which the United States Smelting Company paid the Mammoth Company for this ore. In the second column headed "Amount credited to Mammoth Company with additions and deductions," the first figure affecting any particular credit memorandum being \$11,549.47 as affecting the first credit memorandum shown on this page 7, represents the amount credited to the Mammoth Copper Mining Company by the United States Smelting Company on certain lots of ore, the number of those lots being given in the third [fol. 722] and fifth columns on this sheet, page 7. This first item shown in the second column representing the payment to the Mammoth from the United States Company—represents the net payment to the Mammoth from the United States Company; that is to say, the freight actually paid by the United States Company for the Mammoth Company for these several lots of ore had been deducted in obtaining this net amount of payment. Accordingly, since in the calculation of interest due from Beer, Sondheimer & Company on these particular lots the gross amount of the payment from Beer, Sondheimer have been included without deducting freight, it was necessary to add to this \$11,549.47 the freight actually paid by the United States Smelting Company on these several lots of ore. The amount of these freight payments on each of these is shown in the fourth and fifth columns. These columns are added severally to obtain the total amounts of freight paid by the United States Smelting Company on the ore included in this credit memorandum, and these two sums are transferred into the second column under the figures \$11,549.47 and added thereto in order to obtain a gross amount on which interest should be figured.

Q. The gross amount—state just the fact; the gross amount paid for the ore eliminating freight.

A. Yes, in order to obtain the gross amount paid for the ore eliminating freight. The column headed "Total amount of item" simply transfers the figure showing the total value of the ore without deducting freight, to the right hand side of the sheet. The column headed "Dates elapsing to April 1, 1920," gives for each credit memorandum the dates elapsing to April 1, 1920, plus [fol. 723] the four years shown at the top of that column. The last column headed "Interest at six per cent for days elapsing," is the calculation of interest.

By Mr. Jerome:

Q. As I understand your testimony, so far as you have given it in regard to the computation of interest this morning here, the Exhibits you produced as bearing on the computation of interest, the questions of freight are entirely eliminated, or a process of computation is adopted in its results is the same as if they had been eliminated?

The Witness: That is true with the one exception,—that the freight paid by the United States Smelting Company for the haul from Bartlesville to Altoona on the ore—

Q. (Interrupting.) That was delivered and rejected?

A. That was delivered and rejected and was not an expense that would have been incurred if Beer, Sondheimer & Company had actually accepted the ore.

Q. And save and accept that item all computations either disregard freight or the computation is so done that the result is the same as if the freight had been disregarded?

A. That is correct.

Q. How have you indicated the identity of the various credit memoranda on which you calculated the interest which accrued on the United States Smelting Company payments?

A. Simply by the date given in the first column on the pages 7, 8, 9 and 10.

[fol. 724] Q. And all the entries in the columns to the right of the first column on a line with such dates and above the succeeding date refer to that particular memoranda?

A. That is correct.

Q. I notice in some cases you have drawn a pencil line. Is that for the purpose of more clearly marking off the distinction between figures relating to the different credit memoranda?

A. Yes, that is correct.

Q. Is there any place in these sheets, 7, 8, 9 and so forth where you have varied this method of computing the interest because of particular circumstances?

A. Yes, on page 8 the first credit memoranda dated January 6th, 1915. Certain of the lots included in this credit memoranda are indicated in columns three and five which are headed "Lot numbers" as 4-b, 6-b and so forth. All such lot numbers, where the letter "b" appears means that that lot is ore that was shipped to Bartlesville,

unloaded there, and subsequent reloaded and shipped to Altoona. In the case of all such Bartlesville lots, I have not added the amount of freight paid from Bartlesville to Altoona because that was an item which would not have had to be paid if Beer, Sondheimer had accepted the ore, and by not adding in these freight items on this ore I thereby decreased by a corresponding amount the total amount of the items representing payment from the United States Smelting Company on which I am figuring interest, and thereby increasing our claim against Beer, Sondheimer & Company for interest by a corresponding amount.

Q. What about the items of lots entitled,—105-a, 111-a and 112-a?

A. The "a" I inserted in those cases to make more clear that those [fol. 725] particular lots went to Altoona direct from Kennett and not to Bartlesville, and that the freight paid by the United States Smelting Company on those lots was a proper addition to the net payment in the credit memoranda from the United States Smelting Company, and I have added those freight payments together, and added their total to the actual amount of the credit memoranda as shown in column 2.

Q. Then the letter "a" has no significance except to distinguish those figures from the ones referring to the Bartlesville shipments?

A. That is all.

Q. And the lot number followed by the letter "a" are the same description as those which have no letter after them at all?

A. That is correct.

The Master: It does not mean some other lot of the same number without the "a" initial. It does not mean that 105-a is different from 105.

Mr. Stockton: It does not mean that.

Q. In the case of those particular credit memoranda dated January 6th, 1916—

A. (Interrupting.) Was included in lot 111 which is here marked 111-a, certain concentrates, and I have accordingly taken from Exhibit 121 a figure representing the total amount of the deduction which should have been made on account of the concentrates included in this lot 111, obtaining that figure by adding together the figure \$799.20 appearing in the fifth column of page 1 of Exhibit 121 opposite the lot number 111, and the figure \$112.93 appearing in the seventh column of the same line, to obtain the total of \$912.13, [fol. 726] the total deduction for concentrates. Subtracting this on page 8 of Exhibit 126, I obtain \$19,470.38 as the net amount on which interest should be figured, transferring this amount into the column headed "total amount of items," and figured interest on it for the four years plus the 85 days shown in the column headed "Days elapsing," and obtained the amount of interest in the last column.

Q. Did you follow that same procedure in other cases where the lot numbers represented by the United States Smelting Company's credit memoranda were those lots which contained concentrates?

A. I did.

Q. Are there any other variations in your method of calculations of interest?

A. On page 9, the first credit memoranda dated January 31, the original amount in that credit memoranda being shown as \$7,216.95. There were included in the lots given as composing this credit memoranda lots 88 and 89. This was in error, as the same lots have been settled for in the credit memoranda dated January 6th, 1916, shown at the bottom of page 8. I therefore deducted the amount of these payments for lots 88 and 89 from the original amount of this credit memorandum in order to obtain the amount on which interest should be figured.

Q. What does the last page of Plaintiff's Exhibit 126 represent?

A. That represents the interest correction to be applied on account of the cutting out of lot 42 both from the amount claimed to be due from Beer, Sondheimer & Company and from the amount received from the United States Smelting Company.

[fol. 727] Q. How did you compute it?

A. On this page 11 I have indicated the amount of interest to April 1, 1920, on lot 42 figured as due from Beer, Sondheimer & Company as \$197.36, obtaining this figure directly over the amount of interest figured for lots 42 on page 1 of this exhibit. I then desired to figure the proper deduction of interest on this lot to be deducted from the interest calculated on the amounts received from the United States Smelting Company, but could not figure this interest exactly, as the identity of lot 42 was lost before the United States Smelting Company received the lot, and so I could not tell just when they paid for it and don't know just when the interest should begin. The minimum amount of interest I calculated by assuming that the ore of the lot was paid for by the United States Smelting Company with their last payment for any of the ore shipped to Bartlesville. On this basis the interest that could have been paid at six per cent. on the payment from the United States Smelting Company for this lot 42 was \$97.42.

Q. What did you do with that \$97.42?

A. This \$97.42 I subtracted from the total amount of interest calculated on all the payments from the United States Smelting Company as shown in the total on page 10, obtaining the figure \$88,234.46 as the amount of interest that could have been earned on the final net payment from the United States Smelting Company to the Mammoth Company, the figure of \$197.36 being the amount of interest on the amount figured as due from Beer, Sondheimer & Company on lot 42 I subtracted from the total amount figured as due for interest from Beer, Sondheimer & Company as shown on pages 6 and 10, ob-[fol. 728] taining the net figure of \$165,701.02; subtracting from this amount the net amount of interest that could have been earned on the United States Smelting Company's payment I obtained the figure of \$77,466.56 as the final net payment due from Beer, Sondheimer & Company for interest up to April 1, 1920 after making allowance for the interest that could have been earned on the payments from the United States Smelting Company.

Mr. Stockton: I offer this exhibit in evidence.

(Paper referred to received in evidence and marked "Plaintiff's Exhibit 126.")

Mr. Stockton: That is all.

(Cross examination reserved.)

Mr. Stockton: I want to introduce a stipulation as to the testimony of the witness that was to be taken out in California.

Mr. Tibbetts: No objection. There was a condition attached to that.

Mr. Stockton: On condition that we were to produce affidavits executed by all these witnesses covering the ground covered in the stipulation, and it also was found out there—the analytical day book was found marked Exhibit 39-5 containing some notes in Leslie's handwriting, so Mr. Sutro telegraphed asking if it would be all right to have Leslie identify the book and mark it, and then execute an affidavit, and then have it stipulated, as it was for Maritz and Kindelberger and——

Mr. Tibbetts: We can reserve that until we receive his affidavit [fol. 729] and see what he says in his affidavit.

Mr. Stockton: It is understood that we can produce an affidavit from Leslie authenticating the entries in this missing day book. The day book itself is going to be produced. Will you stipulate also that that can be introduced also in substantially the same form as the present stipulation is?

Mr. Tibbetts: Yes.

Stipulations presented by Mr. Stockton filed with the Master.

Recess to 2:15 P. M.

WALTER H. EARDLEY, resumes the stand:

Cross-examination by Mr. Jerome (continued):

Q. Mr. Eardley, after the repudiation of this contract by Beer, Sondheimer & Company, and the sending or selling of this ore,—the shipping out of the ore that would have come under the Beer-Sondheimer Contract to the United States Smelting Company, the smelting company made a number of contracts, did they not for smelting zinc ores?

A. What period is that.

Q. After the repudiation by Beer, Sondheimer of their contract?

A. You mean after——

Q. (Interrupting.) Beer, Sondheimer & Company, it is claimed here, repudiated their contract some time in the spring of 1915, March or April 1915. At that time and subsequently thereto, during what would have been the life of the Beer-Sondheimer contract, [fol. 730] had it not been repudiated, the United States Smelting Company, had a number of contracts for smelting ores at Altoona, La Harpe and Altoona, did they not?

A. Yes, sir.

Q. If you leave out of consideration all of the Beer-Sondheimer ores, which it is claimed here the Beer, Sondheimer contract applied to, what percentage in tonnage of those contracts were on a toll basis, and what percentage were on a contract of purchase and sale?

A. I would have to figure that out.

Q. Have you never figured it out?

A. No, sir.

The Master: Can you state it approximately. Give him your best impression.

The Witness: I don't remember any toll contracts we had at Altoona during this period.

Q. When you say this period, what do you mean?

A. Up to February 26th, 1915.

Q. For the year say February, 1915, to February, 1916?

A. I mean from the time we purchased the Altoona Smelter up until February 26th, 1916.

Q. You say you had no toll contracts at Altoona that you can recall?

A. No, sir.

Q. Where did you have toll contracts?

A. At Iola we treated ore from the Silverton Mines, and from the Victor Reduction Company on toll contracts, and a few cars from the Rambler Mines under the Silverton Mine contract. I think those were the only toll contracts that I recall we had at Iola. The Silverton Mines contract I think covered three hundred or four hundred tons per month, the Victor Reduction contract I think was something like three hundred tons per month.

[fol. 731] Q. Taking your three smelters, Iola, La Harpe—

A. (Interrupting.) At La Harpe—

Q. (Interrupting.) Wait a minute. And Altoona—you did not have any other smelters, did you?

A. Not during this period.

Q. Confining yourself to this period, and taking your three smelters, exclusive of what we call the Beer-Sondheimer ore, isn't it correct to say that upwards of 75 per cent of your smelting done at those three smelters were on toll contracts?

A. No.

Q. About what percentage was on toll contracts?

A. The entire capacity at La Harpe was on a toll basis, which was about 1,300 tons per month.

Q. So all the smelting at La Harpe during this period was done on a toll basis?

A. Yes, sir.

Q. Take Iola during this period. What percentage of smelting there was on a toll basis?

A. I should say 20 per cent.

Q. Not more than that?

A. I doubt very much.

Q. Isn't there some way you could tell. You were in charge, were you not?

A. I figure that the capacity of the Iola plant was 2,500 tons a month, and I don't think they smelted over 500 tons monthly on a toll basis at Iola.

Q. I mean excluding Beer-Sondheimer ores entirely?

A. Yes.

Q. Of what remained?

A. Yes.

Q. About 2,000 tons were ores that you purchased?

A. I should say that amount.

Q. And 500 tons were ores on a toll basis?

A. Yes, sir.

Q. How about Altoona?

A. I don't recall right now any ores treated at Altoona on a toll basis.

Q. What was the capacity of Altoona?

A. During this period, 3,000 tons per month.

[fol. 732] Q. And how much Beer-Sondheimer ore went there?

A. About a thousand tons per month.

Q. Of the remaining 2,000 tons was any of it on a toll basis?

A. I don't recall right now that we treated anything on a toll basis there.

The Master: Did these smelters run to capacity?

The Witness: Yes, sir.

Q. You have produced here a number of contracts,—toll contracts?

A. Yes.

Q. Do you know how much you received under these contracts during that period?

A. I don't, except the Butte and Superior, and they shipped whatever amount the contract provided for.

Q. And how much is that?

A. The capacity of the La Harpe smelter.

Q. I am talking about the other smelters?

A. We treated no Butte and Superior at any other place except at La Harpe.

Q. Who else did you treat for at Iola on a toll basis?

The Master: He has testified the Silverton Mines, the Victor Reduction and the Rambler Mines.

Q. Is the contract with the Silverton Mine here?

A. Yes.

Q. How much tonnage did they send you a month?

A. I don't think they averaged 200 tons a month in actual shipment.

Q. Who else, for whom else?

A. The Rambler Mines shipped us some ore. I don't think that [fol. 733] tonnage amounted to over 100 or 150 tons total. We had a contract with the Victor Reduction Company, and I don't think their tonnage was more than 200 tons per month.

Q. Anybody else?

A. Yes, there was another. We had a contract with the Big Four Exploration Company.

Q. What was that contract?

A. I would say that they shipped during this period a total of probably 1,500 tons, would be my guess.

The Master: During the whole year?

The Witness: During that period up to February 26th.

Q. You mean a month?

A. I mean during that period.

Q. A little over 100 tons a month?

A. No, that would be,—they did not start shipping until September; there would be five months, an average of about 300 tons a month.

Q. Taking those items together, what do you say now was the amount that you smelted—speaking of Iola, are we not?

A. Yes. Taking all of the Iola contracts as referred to now, we treated probably about 700 tons per month.

The Master: At Iola alone?

The Witness: At Iola ou-side of La Harpe, yes.

Q. I mean not what was the capacity of the Iola smelter, but what during this same period was the actual quantity of ore treated there?

A. I should say an average of 2,500 tons a month.

[fol. 734] Q. Was that capacity?

A. Yes.

Q. And you say that during this period Iola was running at capacity?

A. Yes, always.

Q. And all the ores not treated on a toll basis were purchased by the United States Smelting Company?

A. Yes.

Q. This contract with the Estate of Patrick Clark, where was that ore smelted?

A. That ore was not smelted.

Q. No ores delivered under that?

A. No.

Q. At Altoona, whose ores did you smelt there?

A. We did smelt some of the Big Four Exploration ores there, and some at Iola.

Q. How much a month?

A. I should say the total shipments from the Big Four, I should say did not exceed 300 tons a month.

Q. Would that raise that smelting on toll up to a 1,000 tons?

A. No, sir, that would make it about 700 tons a month.

Q. Altogether?

A. Excluding the La Harpe plant.

Q. How much Silverton ores did you smelt monthly?

A. Two hundred tons. Victor Reduction say 200 tons. Big Four

about 300 tons. The Rambler about 100 tons during the entire period.

Q. And that makes up your 700 tons?

A. Yes,—Silverton, Victor, and the Big Four.

Q. And you were running at a capacity of 2,500 tons?

A. At Iola; 3,000 at Altoona.

The Master: He said that part of the Big Four Exploration ore was treated at Altoona.

The Witness: Yes.

[fol. 735] Q. Were these 300 tons treated at Altoona?

A. No, sir, I say we treated that at the two plants.

Q. Altogether?

A. Yes.

Q. Then how much did you treat at Iola?

A. I don't know how much we treated at Iola. We treated the Victor Reduction, the Silverton Mines, and the little amount of Rambler at Iola and some of the Big Four, but how much of the ores of the Big Four I don't recall.

Q. But the total treatment at Iola on toll contracts would not amount to over 1,000 tons?

A. No, sir.

Q. What about your treatment at Altoona?

A. The only ores we treated on a toll basis that I recall there were some of the Big Four Ores which were included in that 700 tons.

Q. If you allot the whole of the Big Four to Iola, as you say you have done here, you treated how much ore at Altoona, on a toll basis—any at all?

A. Not that I recall.

Q. How many contracts did you have with the Butte and Superior Smelters?

A. During this period we had two.

Q. And that covered the whole of the period up to say March 1, 1915?

A. I would have to refer to the contracts, Mr. Jerome, to answer that.

Q. This agreement of—how many did you ever have with them altogether?

A. Oh, probably five.

Q. Now, you have produced here, two, and one is dated June 28th, 1915, and the other is June 21, 1915?

A. Yes. I think though—

Q. (Interrupting:) When was the next one made?

A. I don't know. I think those contracts provide for the entire capacity of La Harpe up to a certain period beyond this.

[fol. 736] Q. Didn't you have another one in November 1915?

A. I don't know.

Q. (Continuing:) With the Butte and Superior Copper Company?

A. I don't know.

Q. Haven't you any way of finding out?

A. Why I could for instance look through their contracts there, and see what copies they have.

Q. Did you produce these contracts here?

A. Yes.

A. Where did you get them?

A. I think I got them from Mr. Metcalf, from the bunch of contracts given to me by Mr. Metcalf.

Q. Examining that bunch of contracts, were these the only two Butte and Superior contracts you found?

A. As I recall, yes, sir.

Q. You say that these two contracts refer to La Harpe exclusively?

A. Yes, sir.

Q. What was the purpose in this contract of June 21, 1915, of this clause (reading) "The Mining Company shall deliver such ore and concentrates at the zinc plant of the Smelting Company to be designated by the latter from time to time. Such deliveries of the Mining Company to be made f. o. b. railroad cars of the Smelting Company's plant, provided, however, that should the Smelting Company direct deliveries to any plant where the freight rate exceeds the freight rate to Altoona, Kansas, the Smelting Company shall pay the excess"?

A. That is an ordinary clause in a contract.

Q. That gave you the right to have that ore sent to any point, didn't it?

A. Yes.

Q. And the freight rate basis was calculated on the rate from the mine to Altoona, wasn't it?

A. No, I don't think so.

Q. What does it mean?

A. Does it say—

[fol. 737] Q. (Interrupting:) It reads that should the Smelting Company, that is your company, direct deliveries to any plant where the freight rate exceeds the freight rate to Altoona, Kansas, the Smelting Company shall pay such excess?

A. I would assume that we had at that time purchased the Altoona plant, and the La Harpe plant was being reconstructed, and freight rates were not yet established to La Harpe. It was to protect the Mining Company as to the freight rate, and it was so worded.

Q. There was nothing in those contracts that required the ore to be sent to La Harpe, was there?

A. The intention was to have them ship ore to La Harpe for the capacity of the La Harpe smelter.

Q. Why?

A. I have none of those contracts here, Mr. Jerome.

Q. The contract of June 21, the one which I have been asking about, had in this clause I have read, which gave you the right to have the ore go anywheres you wanted it?

A. Isn't there something in the other contract that specifies that ores are to go to La Harpe, that they should ship enough to keep the La Harpe plant running at capacity?

Q. The other contract was made seven days later,—June 28th?

A. Yes.

Q. So that the prior contract; the one I read from, June 21, has nothing about La Harpe at all?

A. Well, as I stated in my testimony before, not to-day, however, the Butte and Superior Company or Mr. Barker for them, had an option on the La Harpe plant, and it was due to that fact that we made the contract with the Butte and Superior for the treatment of [fol. 738] their ores, and it was contemplated that we should treat them at La Harpe, and we purchased the smelter for that purpose.

Q. Yet the first contract with them did not mention La Harpe at all,—the contract of June 21?

A. Well, I don't know whether it mentioned La Harpe, I haven't looked at it lately.

The Master: It speaks for itself.

The Witness: That does not make any difference in my opinion.

Q. I was not asking you for your opinion, I am asking for facts. These contracts then, as I understand, in a measure, in the exigency of the situation owing to your desire to acquire the La Harpe property acted,—in a measure, you were forced into this contract with Butte and Superior?

A. Yes.

Q. Otherwise you as manager there would not have made a toll contract with them?

A. Not on that basis; no, sir.

Q. What exigencies forced you into the toll contracts with the other people?

A. The same with reference to the Big Four, but none with reference to the others.

Q. What forced you in regard to the Big Four?

A. Mr. Nicholson had arranged and agreed on terms with the Big Four Exploration Company for the treatment of their product, and he would only sell the La Harpe plant upon our assuming the arrangement made with the Big Four by himself.

Q. Then, as to the other toll contracts, was there anything that forced you into them except a conception of what was good business?

A. No, sir.

[fol. 739] Do you know anything about the terms Butte and Superior at the same time were getting from other smelters?

A. No, sir.

Q. Did you make any inquiry at the time?

A. Not that I recall.

Q. You think it was good business judgment to take these other people on at toll rates where you were not forced by any particular circumstances?

A. The others; yes.

Q. When was it you acquired the La Harpe smelter?

A. I should say the contract covering the purchase was made about June 21, 1915, but the plant was not completed until about September 1, 1915.

Q. Then these contracts of June 21, and June 28th, 1915, with

the Butte and Superior were contracts made by the United States Smelting Company with the desire of fulfilling the arrangement that had been made between the former owners of La Harpe and Butte and Superior. In other words, you had to assume their contracts in order to get the La Harpe plant?

A. Not with respect to Butte and Superior. The Butte and Superior had an option on the La Harpe smelter.

Q. But you could not get La Harpe unless you made this contract?

A. They would not release them from the option unless we agreed to make a contract with this Mine.

Q. You made two contracts in June?

A. Yes.

Q. And then acquired the La Harpe plant?

A. Yes.

Q. In November of the same year you made another toll contract with Butte and Superior on substantially the same terms, didn't you?

A. I don't remember.

[fol. 740] Q. You cannot recollect?

A. I don't remember making one in November.

Q. You made one subsequent to these two?

A. We made more than one.

Q. Toll contracts?

A. Yes.

Q. On substantially the same terms?

A. I would have to refer to the contracts; I don't remember.

Q. Cannot you recollect?

A. No, sir.

Q. Those contracts were for the entire capacity of the La Harpe plant?

A. For some time; yes.

Q. And you had charge of La Harpe plant, didn't you?

A. Yes.

Q. And yet you have no recollection whether you contracted for its entire capacity?

A. I don't recollect what modifications, if any, were made in subsequent contracts. I think there were some modifications.

Q. When you made these subsequent contracts, the sale of the La Harpe plant to the United States Smelters had already been consummated?

A. Yes.

Q. And you were not forced into the contract by any exigencies?

A. No, sir.

Q. It was simply good business judgment?

A. We made the contracts.

Q. Look at that, what purports to be a copy of a contract made in November, 1915, between Butte and Superior and the United States Smelters. See if that refreshes your memory at all?

A. May I see those other two contracts? Papers handed witness.) These first two contracts cover the capacity of the La Harpe smelters to January 1, 1916, and is so specified in the contracts.

Q. How about the third contract I am asking you about?
[fol. 741] A. Apparently was one made sometime in November 1915 to cover 3,000 tons which was to keep the La Harpe plant running through additional months.

Q. And that was a toll contract,—was it three months or five months?

A. I recall now that during the fall of 1915 we had a gas shortage at La Harpe, and did not treat the tonnage contemplated when the two original contracts were made, and we had a large tonnage of their ore on hand for treatment subsequent to January 1, 1916, and in November made a contract for 3,000 tons of ore for treatment to be shipped at the rate of 600 tons a month which in addition to the ores we would receive under the former contracts would run the smelter until June 1, 1916.

Q. And that is the contract, a copy of which I have shown you?

A. Yes.

Q. There was no exigency in connection with the smelter that forced that on you?

A. We were not forced to take this contract.

Q. And then after that contract you went on and made subsequent contracts with Butte and Superior for smelting ore?

A. Yes, I think we made one or two more.

Q. And on a toll basis?

A. On a toll basis.

Q. And those were not forced on you by any exigency?

A. They were not forced on us.

Q. Why did you find it good business to make a toll contract with the Butte and Superior outside of the first two which you say were forced on you practically rather than a purchase and sale contract, and why didn't the same reasoning that led you to do that with Butte and Superior apply to these Mammoth ores?

[fol. 742] A. This contract made in November 1915 provided a minimum working charge of \$36.25, so that no matter what happened, whether spelter went down to four cents, or whether it was ten, we always received \$36.25 minimum working charge, with the possibility of securing an additional amount.

The Master: What does that mean? Per ton?

The Witness: Per ton. And where we eliminated all risk of the market—Mr. Schott at times felt it policy to take toll contracts, would rather make a little smaller profit than to take a chance making a larger profit and assume the risk of the market. There was one other thing in connection with this Butte and Superior contract. We had not up to that time been selling their spelter—

The Master (interrupting): You mean of November 21?

The Witness: Yes.

A. (Continuing:) About the time of making this contract we made an arrangement with them for the selling of their spelter on a commission basis of one per cent, and the company was desirous of maintaining a relationship with the Butte and Superior with the idea of ultimately handling a part or all of their product at the zinc

smelters. We were contemplating at that time the building of a zinc smelter at Blackwell, which we considered would be a permanent plant, and we desired to maintain a relationship which could be continued when we went into the game on a permanent basis. [fol. 743] Q. Did you not consider the contract made with the Mammoth Company more profitable to the Smelter than a toll contract?

A. What kind of a toll contract? These different toll contracts are on different basis.

Q. Did you consider a toll contract at all at the time the contract for the Beer-Sondheimer ores was made?

A. No, sir.

Q. Why not?

A. I don't remember why we did not. The ordinary form of contract prior to the war was on the basis of an outright purchase, and we made the regular form of contract with the Mammoth Copper Mining Company for their product.

Q. Toll contracts were not in use at that time, you say?

A. I don't know of any toll contract prior to the war.

Q. I am asking about toll contracts by United States smelters?

A. I referred to smelters generally.

Q. Prior to the war ores were not smelted on toll contracts at any of the smelters, you say?

A. It was exceptional if there were.

Q. Prior to the war didn't you have a contract with the American Zinc and Lead Company,—a toll contract?

A. The United States Smelting Company had a contract with the American Zinc and Lead Company for the treatment of the Huff Electrostatic product.

Q. Was that a toll contract,—made on a toll basis?

A. (Continuing:) And the reason that contract was made that way was that the American Lead and Zinc Company owned the Huff Electrostatic machines, and we had to make the contract in [fol. 744] order to secure the use of the machines at Midvale.

Q. So at that time you did have at least one toll contract?

A. Yes, sir, the United States Smelting Company at Salt Lake

did.

Q. Do you know whether these ores were offered at all to the New Jersey Zinc Company before this contract was closed?

The Master: You mean the ores included in this action.

Mr. Jerome: Yes.

A. I don't recollect offering them at that time to the New Jersey Zinc Company.

Q. They were big zinc smelters, were they not?

A. Yes, they were large,—they had a large zinc capacity. I don't remember of any specific offer to them. I was well acquainted with the conditions. I probably saw Mr. Keefe at different times in Salt Lake and Denver, but I don't remember any specific offers.

Q. In shopping around to see what market there was, did you approach them?

A. I don't remember whether I did or not.

Q. Were they offered to Anaconda?

A. I don't know just when Anaconda commenced purchasing custom ores, but I am satisfied they were not purchasing custom ores at that time.

Q. I am asking if you offered them?

A. No, sir, I did not.

Mr. Jerome: I offer this copy in evidence subject to correction with the original contract.

Paper referred to marked Exhibit 111.

[fol. 745] Q. Did you have a purchase contract with the Big Four previous to that?

A. No, sir.

Q. You were aware that this contract between yourself and the Mammoth Company for these Beer-Sondheimer ores, we will call them, was subject to five days' cancellation, did you not?

A. Yes.

Q. So that at any time that United States Smelters wanted to, they could either cancel that contract or turn it into a toll contract if Mammoth assented?

A. Yes, if Mammoth had assented.

Q. Did Mammoth ever propose to you to convert it into a toll contract,—substitute a toll contract for it?

A. No, sir.

Q. Did you ever suggest to Mammoth that this be done?

A. No, sir.

Q. During the life of this contract between Mammoth and United States Smelters, in regard to the Beer-Sondheimer ores, if those ores had been received under toll contracts, received by the United States Smelters under toll contracts similar to the ones they then had outstanding, would that not have been more profitable to Mammoth?

A. You would have to make that comparison with one particular contract.

Q. Take the contract at which the toll rates were highest that you had outstanding, and state whether or not it would not have been more profitable to Mammoth had those Beer-Sondheimer ores been treated at these rates?

A. In my opinion, Mammoth would have received less money for their ore than they did under the existing contract.

Q. What toll contract do you base that opinion on?

A. I have in mind the Silverton Mines contract.

[fol. 746] Q. How much was this contract with the Silverton Mine?

A. I think it provided for three hundred tons per month.

Q. That is a very small shipment, isn't it?

A. I consider it a very good tonnage for a zinc smelter.

Q. And you say that if Mammoth had been smelting that with

you on a toll basis at the same rates as the Silverton Mines Limited had, that you think the return to Mammoth would have been less?

A. That is what I stated. It would, of course, depend some on the Mammoth Copper Mining Company's ability to market their spelter. It would depend a whole lot on their marketing of spelter.

Q. If they marketed it at the current price in the Engineering Journal—

A. (Interrupting:) If they had sold it always, and could secure the E. & M. J. price, I think they still would have received less money than they did receive.

Q. In this Exhibit 110, you have got opposite the Big Four Company,—“Min. toll charges 60; used 80 per cent recovery, \$2,960.”

A. That is the amount they would have received.

Q. That is under date of July 29th, 1915?

A. June 29.

Q. There was a subsequent contract with them, wasn't there?

A. No, I don't know.

Q. Under the same contract was there any change in those figures after the first of January?

A. Yes, after the first of January the minimum treatment charge was eliminated and the treatment charge thereafter depended upon the spelter market.

Q. And what would it have amounted to on that basis?

A. I would have to figure that out. After January 1st, ore shipped [fol. 747] after January 1st, 1916 on a 14 cents spelter market would have netted the Big Four Company about \$50.60 a ton.

Q. As against \$29.60 as shown on Exhibit 110?

A. Yes.

The Master: That is prior to January 1st?

The Witness: Yes, sir.

Mr. Tibbetts: It does not say prior to January 1st on the Exhibit.

The Witness: Yes, that came out in the testimony when this was introduced.

Q. I understand you to say the spelter market would have—

A. (Continuing:) I say the Big Four would have received \$50.60.

Q. The heading of this Exhibit states “Statement of various ores purchased under contract showing amount shipper would receive on 14 cents spelter market, or approximately the average price from 7/21/15”—which I take to mean the 21st of July 1915—“to 2/26/16”—which I take to be February 26th, 1916?

A. Yes, sir.

Q. Then that is incorrect that entry of \$29.60. That would only be correct up to the 1st of January, and not up to the 26th of February?

A. The heading states that the average price of spelter for that period was 14 cents.

Mr. Jerome: That is all.

Redirect examination by Mr. Stockton:

Q. Did La Harpe Smelter smelt anything except Butte and Superior ore?

A. Not during this period.

[fol. 748] Q. Now, Mr. Eardley you had been making contracts for the purchase of ores for about how long at the time you became manager of the United States Smelting Company?

A. Seven years.

Q. And the making of contracts for the purchase and sale of ores had been your exclusive duty for the past few years, had they not?

A. Yes.

Q. Will you state whether in June or July 1915, the toll contract was the usual form of purchase for zinc ores by smelters?

A. No, I should say it was not the usual form.

Q. In cases where you made a toll contract, was it done generally at the instance of the shipper?

A. No, I don't think so.

Q. Is there any risk upon the seller who makes a toll contract which the seller who makes a contract to sell outright does not have?

A. A very considerable risk. Toll contracts proved to be most unsatisfactory contracts because, with the exception of the Butte and Superior contract, there was no recovery guaranteed, and it was entirely up to the smelters how they handled the ore and what recovery was made. They also assumed the market risk in the sale of the ore,—I mean the shipper assumed the market risk in the sale of the spelter, and there were times when you could not sell spelter at the E. & M. J. price. That was only a nominal figure; so there were risks involved on the part of the shipper under toll contracts.

The Master: Under those toll contracts, did the Smelter deliver the spelter to the shipper or did the Smelter sell it for account of the shipper?

The Witness: Both ways.

[fol. 749] Q. At the time the price of zinc was around 14 cents a pound, if a shipper made a toll contract, would he stand to lose more or less than a shipper selling outright if the price of spelter should drop rapidly?

A. He would assume a larger risk, of course.

Q. Can you tell me what the price of spelter was at the time you made the arrangement with the Mammoth Copper Company to take this ore?

A. On that particular date, I don't remember. I can give you a general idea. About the tenth of June, spelter had advanced to about 26 cents a pound; it immediately dropped to 17 and three fourths cents, and then went back to 22 and one-half cents, and dropped to 10 cents by the middle of August; so that all happened between June 15th and the 15th day of August.

Q. On what date was the contract between the United States Smelting Company and the Mammoth Copper Mining Company made?

A. On the 21st day of July, 1915.

Q. Have you any way in which you can refresh your recollection as to what the price of spelter was on that date?

A. I haven't unless you got some,—I haven't that statement with me I made up showing that.

(Paper handed to witness by Mr. Stockton.) This does not show the daily quotations here.

Q. What were they for that week?

A. For that week 18.75 cents.

Q. Can you state at that time whether the market was dropping or rising?

A. The next week it was 17.06 cents.

[fol. 750] Q. What was it the week after that?

A. 15.229 cents.

Q. What had it been prior to the time of that agreement?

A. It had been up to 26 cents.

Q. On July 21, 1915, if there should be a rapid drop in the spelter market, and the Mammoth Copper Mining Company had made a toll contract, would it stand to lose more or less than if it had made this contract for the outright sale of spelter?

A. That depends on the terms of the contract, of each contract, and the amount received for the spelter.

Q. I am assuming a toll contract such as—

A. (Interrupting.) Let me state this. If you had a contract for the outright purchase, and the price to be paid was based on the date of shipment, or the date of arrival at the works, and the market was dropping, naturally that contract would be preferable to a toll contract where the shipper had to wait until the product was smelted and the spelter delivered to him before he could sell it.

Q. And on a dropping market there would be less chance for loss on a contract for outright sale such as you described, rather than a toll contract?

A. Under those particular conditions.

The Master: The seller eliminates the risk of the market.

The Witness: Yes, sir.

Q. As a matter of fact did you have offered to you ore practically corresponding in desirability to the Mammoth ore in any large amount during that period?

A. We had large tonnages of sulphide ores offered.

[fol. 751] Q. Did you have any offer of Spanish ore ever made to you?

A. Yes.

Q. At about what figure?

A. At one time we were offered 40,000 tons of Spanish ore in connection with 20,000 tons of Algerian ore. The Algerian ore was carbonate ore. The Spanish was about 40 per cent. sulphur.

Q. How did the prices at which you were offered it compare with the price you gave the Mammoth Copper Mining Company?

A. That price is reflected through the purchase of one cargo of

Spanish ore which is shown on one of the Exhibits here. It is just about the same as the Kennett ore,—a few cents less.

Q. Did you accept that offer?

A. No, sir; I did not.

Q. Did you have the capacity to—was the fact that you did not have the capacity to handle the ore a factor in causing you to reject the offer?

A. Naturally.

Mr. Stockton: That is all.

Recross-examination by Mr. Jerome:

Q. The provisions in this toll contract here in evidence are the usual provisions in toll contracts, are they not, where they relate to the Smelting Company using the highest degree of care and modern methods, allowing the purchaser of the ore being smelted to have some one present at the smelters to require changes in methods of recovery, et cetera?

A. Mr. Jerome, I never considered any contract was a particular form to be used at all times. We made contracts to suit the conditions and it depended a good deal upon how good a trader the other man was as to what conditions we would put in and leave out.

Q. Isn't it usual in all toll contracts that you ever saw for the person whose ores were being smelted to have a provision in there to enable him to have some check on the honesty of the methods pursued in getting recoveries of spelter?

A. Generally they have a provision providing for a representative there at their option.

Q. And that is to protect them against recklessness in the smelting of the ore, in the methods used, to make the recoveries as high as possible?

A. That is the extent of the provision.

Q. And your smelters were all being run on a strictly honest basis so that the highest percentage of zinc spelter would be recovered?

A. Yes.

Q. Therefore, Mammoth took no risk at all with the United States Smelting Company?

A. We did our very best with everyone to get the highest amount of spelter out of the ore.

Q. The Mammoth knew, and you knew, you were both subsidiaries of the same parent company?

A. Yes.

Q. You had confidence in each other?

A. Yes.

Q. Neither one could have any reason to cheat the other?

A. No, sir.

Q. There was no element of risk in wasteful processes in a toll contract between Mammoth and the United States Smelting Company?

A. No, sir.

Q. So the only risk was the market fluctuation?

A. No, he, Mr. Metcalf, stood a risk on recoveries, but not due to our negligence or wastefulness.

The Master: He means if you made a toll contract.

[fol. 753] Q. If a toll contract was made the risk would be in the variations in the market price of the metals?

A. Yes, and he would also assume a risk as to the recovery irrespective of how careful we might be.

Q. He had full opportunity of knowing what your average recoveries were?

A. I don't think he had at that time.

Q. You could have told him?

A. We were not running the smelters very long at that time. We had not gotten out one monthly statement.

Q. You knew, didn't you?

A. No, I did not know; we hadn't made one monthly statement.

Q. You mean you never knew what your recoveries were?

A. I did not have any definite idea. I received the daily statement from the smelter which gave the recovery on roasted ore, but we had not at that time made any monthly statements to show what the recovery on the crude ore was.

The Master: How long had you had the Altoona plant then?

The Witness: We took over the operations on June 16th, and we made the first statement on August 1.

Q. You knew it on August 1st?

A. Shortly after that.

Q. You knew it was still receiving Mammoth ores and smelting them?

A. Yes.

Q. And Mr. Metcalf could have known from you if he wanted to, and you would not have concealed it from him?

A. No, sir.

[fol. 754] Redirect examination by Mr. Stockton:

Q. Were the facts Mr. Jerome brought out about your close relationship and the manner in which you ran the plant at Altoona the reason why you did not use the splitting system for settlements of assays on ore of the Mammoth Company, and he had no representative at your plant?

A. No, sir; I don't think so. That was customary with at least fifty per cent. of our customers; they all had confidence in us.

Adjourned to December 2nd, 1920, at 10:30 A. M.

JOHN LAURIE (recalled for plaintiff):

Cross-examination by Mr. Jerome:

Q. Have you produced here the cost sheets in the possession of the parent company of these corporations with reference to these ores that were smelted—these Mammoth ores?

A. Yes.

Mr. Stockton: We object to the introduction of this testimony on the ground that we do not believe it is relevant and on the ground that it is not proper cross examination. We are perfectly willing to produce the cost sheets if Mr. Laurie is made his own witness.

Mr. Jerome: Well, I make him my own witness.

The Master: Do you object to the materiality of this evidence?

[fol. 755] Mr. Stockton: I object to any line of questioning seeking to bring out any profit made by the United States Smelting Company from the sale of the zinc contained in the ore shipped to it by the Mammoth Copper Mining Company on the ground that it is immaterial and irrelevant; and on the further ground that it is impossible to segregate from these cost sheets the figures showing the profit on the Mammoth Copper Company's ore from the general figures showing the profit on all ore handled at the United States Smelting Company's plant.

The Master: The last part of the objection does not appear yet. If it does it will defeat the testimony in itself. If it is impossible to disclose the facts from the sheets, nobody will be hurt. In regard to the materiality of the testimony generally, the objection may be good. I am not convinced that the evidence is immaterial but I think on a hearing like this I should take the evidence so that it will be before the Court if I should decide finally that the evidence is immaterial. Therefore, I overrule the objection.

Mr. Stockton: Exception.

Q. Mr. Laurie, you have produced here from the custody of the United States Smelting, Refining and Mining Company certain documents which, for the purpose of interrogation we will call cost sheets, have you not?

A. Yes.

Q. These cost sheets, covering the period during which the ores that would have been sent by Mammoth to Beer-Sondheimer & Com-[fol. 756] pany, if they had not repudiated the contract, was smelted at the Smelting Plants at Iola and Altoona of the United States Smelting, Mining and Refining Company, or its subsidiaries?

A. Yes.

Q. Examining these cost sheets as you have produced them, there are various statements in them, figures and dollars, percentages and tons, and figures in cents as well, and opposite such entries there are statements which are intelligible on their face. These various statements are to be taken and understood at their face value, are they not, just what they purport to be?

A. Yes, sir.

Q. And the same is true of the figures and symbols of dollars and percentages of dollars and cents?

A. Yes, only they do not give a complete record. There are other charges to be made.

Q. But so far as they give us a record, they are true records of the transactions which they purport to record?

A. That is so.

Q. Now, these various sheets, cost sheets, show without exception, do they not that the period as to which I am interrogating you, namely, the period that the Beer-Sondheimer ores, the ores Beer-Sondheimer would have taken had they not repudiated their contract were being smelted at Altoona or Iola, the cost sheets for that period in every case show a net profit to the smelters on custom ores?

A. I don't think so.

Q. The cost sheets?

A. Shows that during part of that period. My recollection is that the tabulation showed losses also.

Q. During the month of July, 1915, at the Altoona plant there was a net profit on custom ores?

A. At Altoona?

[fol. 757] Q. Yes.

A. Yes.

Q. In other words your cost sheets produced showed that there was a net profit on custom ores at Altoona during that month?

A. Yes. Just one moment. I want to be sure of that statement. It is possible every month might show a profit but I am not quite sure without referring to some tabulation whether or not there was. There may be some months in which a loss was shown by these cost sheets; I am not sure.

Q. Have you such a tabulation with you?

A. Yes.

Q. Will you produce it here, please, to enable you to answer?

A. (Witness produces paper.)

Q. During what months were the ores, which I will term for the purpose of interrogation, the Beer-Sondheimer ore, meaning thereby the ores which were smelted under the contract between Mammoth and United States Smelting Company, and which should have been taken by Beer-Sondheimer had they not repudiated their contract—during what months were those ores smelted at Altoona and Iola?

A. I am informed that at Altoona they were smelted in the months from July, 1915 up to September, 1916, and at Iola in the months of February and March, 1915.

Q. February and March?

A. 1916. I state that from information given to me which does not show on the cost sheets.

Q. And that is correct?

Mr. Stockton: That is correct.

Q. Now, taking the smelter at Altoona for the period from July 15 to September, 1916, do not these cost sheets show in every case [fol. 758] a net profit on custom ores smelted at that smelter?

A. Not in every case.

Q. Will you state what months during that period there was not a profit?

A. In the months of July and August the Altoona plant showed a loss on custom ores.

Q. Now, taking the aggregate——

Mr. Stockton: In what year?

The Witness: 1916.

Q. Was that a quotational loss?

A. That was due to a quotational loss.

Q. Will you please state what a quotational loss is?

A. A quotational loss on ores is when the smelter produced from the ores is sold at a lower price than the market price used in determining the purchase price of the ores.

The Master: That would be the market price specified for that purpose in the contract, is it?

The Witness: The price specified in the contract would probably say, Engineering and Mining Journal price, or something like that, and then the price used would depend on the market quotations for the month in which the ores were received at the smelter.

The Master: Is this quotational loss a real loss?

The Witness: A real, absolutely genuine loss. That was money out of our pockets as I see it.

[fol. 759] Q. Does it represent money actually out of your pocket or does it represent a loss of profits that you otherwise would have received?

A. Oh, no, it represents an actual loss, because we have purchased the ore and paid for the spelter in the ore on the basis of certain prices——

The Master (interrupting): On the basis of a higher quotation.

The Witness: Yes. Suppose we purchased the ores when spelter is at, say 12 cents a pound.

The Master: An adjusted price on that basis.

The Witness: We have to pay for these ores at a high price compared to what we would have paid if we had gotten spelter at six cents, and later on we sell that spelter on a falling market at say seven cents a pound, there a real quotational loss is sustained; it is an actual loss, but we, for convenience, call it a quotational loss.

Q. Will you show me the cost sheet of the Altoona plant for the month of July, 1916, which is one of the months in which you say a loss was made?

A. (Witness produces paper.)

Q. Taking the cost sheet of the Altoona plant, page 5, "Statement of profit and loss for July, 1916," we find this item, "Operating profits on custom ores \$46,362.89." What does that signify?

A. That signifies that the plant made a profit on operations during that month subject to additional or deduction for any profit or loss arising out of changes in the price of spelter; that is, if the [fol. 760] spelter price had remained absolutely the same from beginning to end of these transactions that would have been the profit.

Q. Doesn't it mean this: That after paying for the ores smelted during that month at that plant, and adding to it all the expenses of smelting those ores, there remained the sum of \$46,362.89?

A. That sum did not remain at all; we could not say that sum remained until we knew at which price we would sell the spelter.

The Master: It requires an assumption when you reach that figure of some price for the spelter.

The Witness: Yes.

The Master: What price did you assume?

The Witness: We assumed the price at which the spelter was purchased in the ore.

The Master: So that if you were to sell, and actually realized on the spelter at a lower price, that is what you would call a quotational loss?

The Witness: That is so.

The Master: Under that column "Operating profit" those are all in a certain sense hypothetical profit.

The Witness: Yes.

The Master: You don't get at your actual profit or loss until the spelter has actually been sold?

The Witness: No.

The Master: And you know the price that was realized?

The Witness: Yes.

[fol. 761] Q. These quotational losses, on what basis is the price of the metal calculated there—the price of the metal at the time of the sale of that specific metal, or its price when it was finally smelted—finally produced?

A. In cases where the price of sale was known, as I think usually happened, the sale price would be used, but it might happen that at the end of a month some of the spelter had not been sold or contracted to be sold, and I think in that case it was probably the value, the market value at the end of the month that would be taken. I am not sure about that, because I did not keep these cost sheets.

Q. These costs sheets as you have produced them here, were they compiled at the Boston office or were they forwarded to you from the different plants?

A. They were forwarded to me from the Kansas City office.

Q. So that as they lie before us now, they were compiled and sent from the Kansas City office, which represented both the Altoona and Iowa plants?

A. Yes, sir.

Q. You have prepared a summary of Altoona earnings from July 1, 1915 to September 30, 1916, have you not?

A. It was prepared under my direction.

Q. Having that before you can you tell me how many months—what months in the period July 1, 1915 to September 30th, 1916, there was an operating profit from custom ores to the Altoona smelter?

A. There was, what I may call a hypothetical operating profit during each of these months, but I would not describe these figures as profits without taking into consideration the effect of the variation in quotations.

[fol. 762] Q. I will change my question then. Taking your summary for the purpose of refreshing your memory, will you please state in what months in the period July 1, 1915 to September 30, 1916, the Altoona plant as it appears from the cost sheets, showed an operating profit on custom ores?

A. These sheets as prepared by the plants at the Kansas City office showed an operating profit every month from July, 1915 to September, 1916, at Altoona.

Q. And making for that period an aggregate profit of \$796,328.15?

A. Yes.

The Master: An aggregate operating profit?

The Witness: Yes. I think I should say that I am using the words "Operating profit" simply as we for convenience call it operating profit. I would say that that was not a profit at all without considering not only the charges and deductions in the quotational column, but also other charges and deductions which do not appear on the sheets prepared at the Kansas office.

Q. Will you tell me, during this same period, what was the aggregate amount of the quotational loss as shown by these cost sheets at the Altoona Zinc Plant?

A. At Altoona, the quotational loss was \$293,762.73.

Q. Will you tell me what months as shown by these cost sheets during this period, there was a loss on the smelting of custom ores?

A. In the months of July and August, 1916.

Q. And what was the aggregate loss?

A. \$5,411.90.

[fol. 763] Q. And what, as shown by these cost sheets, during the same period was the aggregate profit on custom ores?

A. \$502,565.42, subject of course to certain deductions and adjustments.

Q. And as shown by these cost sheets, what was the aggregate profit at the Altoona plant in the smelting of ores, both custom and toll ores, and the residues etcetera during this same period?

A. \$597,166.94 subject to the same deductions as mentioned before.

Q. Are there any records here, as far as you know, that shows the amount of Kennett ores, ores for Mammoth, that was smelted each month at the Altoona plant?

A. I know of no such records.

Q. I understand from your answer then, that you know of no records which were kept at Kansas City, Altoona or Boston which would show the months in which the ores received from Mammoth

—the Beer-Sondheimer ores as I termed them for interrogation purposes, were smelted?

A. Certain records kept in the Kansas City office would show the tonnages of Kennett ores smelted each month. They must have shown that, and they would all necessarily show the profit or loss.

Q. That would be lumped with the general profit?

A. Yes.

Mr. Jerome: Are those records here?

Mr. Stockton: The ore purchase book would show that.

Mr. Jerome: Shows the months smelted?

Mr. Metcalf: It would not be summarized. You would have to pick off the individual lots.

[fol. 764] Q. It appears from these cost sheets then, does it not, that making all allowances and deductions for quotational losses, that the earnings of the Altoona plant from July 1, 1915, to September 30, 1916 was \$597,166.94?

A. It was, subject to the deductions I mentioned.

Q. Subject to what deductions?

A. Subject to deductions for depreciation, interest, administration charges and loss realized on a sale of the plants when they were scrapped.

Q. Leaving out the scrapping of plants, have you any figures showing these various items of overhead chargeable against that profit including depreciation of plant, of course?

A. I can show deductions for interest, and administration, but not for depreciation separately from the depreciation that was determined when the plant was scrapped.

Q. Well, everything up to the scrapping of the plant you can tell about now?

A. Yes, I considered that the loss realized on the sale of the plant when it was scrapped represented the depreciation, and must necessarily be charged over the whole period—

Q. (Interrupting.) When was the plant sold?

A. At the beginning of 1918.

Q. Long after all these Beer-Sondheimer ores had been smelted?

A. Yes.

Q. And when the condition of the spelter market was very different from what it had been?

A. I don't recollect about the,—I dare say the spelter market was much lower then.

Q. After allowing interest on working capital, proportion of administration expense, and the interest on investment, and the proportion of loss on the sale of the plant, what was the balance of the [fol. 765] \$597,166.94 remaining as net profit?

A. \$386,018.58 was the net profit from all ores.

Q. After making these deductions I have mentioned?

A. After making these deductions you have mentioned.

Q. And among those deductions was one of the proportion of loss on the sale of the plant?

A. Yes, sir, that loss included of course the depreciation.

Q. Does not that show then, that at the end of this period of September 30th,—that during this period from July 1, 1915 to September 30, 1916, the Altoona plant, after making all the adjustments and deductions, had made for its owners \$386,018.58?

A. Yes, it does.

Q. The result then to the owners of the Altoona plant, as the result of its operations during this period July 1, 1915 to September 30, 1916, would be to leave them a profit, although the entire loss on the sale of the property is charged against that period.

A. No, sir, I have only charged against that period that proportion of the loss calculated on a tonnage basis which was properly applicable to that period on a tonnage basis.

Q. Charging the loss on the sale of the property applicable to that period, would still leave a net profit to the owners of that plant, wouldn't it?

A. It would leave this profit.

Q. \$386,018.58?

A. Yes.

Mr. Jerome: I ask that this paper be marked for identification.

Paper referred to marked "Defendant's Exhibit A, for Identification.

[fol. 766] Q. This paper, marked Defendant's Exhibit A. for Identification, with the annexed schedules, is as you understand it, a correct summary from these cost sheets so far as the data therein overlaps the data in the cost sheets, or coincides with the data in the cost sheets?

A. Yes.

Mr. Jerome: I will offer this in evidence.

Defendant's Exhibit A for Identification marked in evidence.

The Witness: Will you read that question again.

Q. (Question repeated by stenographer.)

Q. What I mean is this. That while Exhibit A for Identification is based as far as it goes upon the cost—is a summary of the cost sheets, it does not purport to contain everything that the cost sheets contain in detail?

A. Not in detail, but it reflects the effect.

Q. In other words, it is intended to be, and you believe it to be a correct summary of the cost sheets during the period of July 1, 1915 to September 30, 1916, of the Altoona plant, as shown in the cost sheets?

A. Yes.

Q. Have you a similar summary for the Iola plant?

A. I have prepared a summary for Iola for the two months during which, I understand that Mammoth ores were being smelted at Iola.

Q. This paper, Defendant's Exhibit B for Identification purports,

does it not, to be such a summary of the cost sheets in regard to the Iola smelter for February 1916, as Defendant's Exhibit A was for the Altoona plant during the period I have mentioned?

A. Yes, February and March 1916.

[fol. 767] Q. And is compiled in the same way and has the same relation to the cost sheets as Defendant's Exhibit A.?

A. Yes.

Mr. Jerome: I offer that in evidence.

Paper referred to marked "Defendant's Exhibit B" in evidence.

Q. Will you again, please, point out from what you denominated as a typical cost sheet for the Altoona plant one rather at the earlier portion of that period than at the end?

A. Take this one at random.

Q. You have pointed out a cost sheet, page 3, a cost sheet with the Altoona Zinc plant headed "Statement of profit and loss, December 1915," that seems to you, as near as one of these sheets can be, a typical cost sheet of the Altoona plant?

A. Yes, I think so.

Q. We find on that cost sheet three groups of entries,—“This month,”—“Last month,”—“Year to date,” The entries under the heading “This month,”—I take it, refer to the month of December 1915?

A. Yes, sir.

Q. And the entries under “Last month,”—would refer to the month of November 1916?

A. Yes.

Q. And “Year to date” the entries under there would refer to the period of twelve calendar months preceding the first of January 1916,—or the 31st of December 1915?

A. In this case it would be less than twelve months because the plant only started operations in June,—covered operations from the time the plant began to operate.

Q. Up to the end of December 1915?

A. Yes.

Q. And in other cost sheets under such heading “Year to date,” [fol. 768] where the plant had been actually operating for twelve months, it would mean to include the particular months of the heading, and the eleven preceding calendar months?

A. Yes, sir.

Q. Now, in the entries opposite “Pur. value zinc contents,”—the entries in these columns after that signify what?

A. The first column shows the quality of zinc contents in the ore purchased, it says there; possibly, that might mean smelted; the purchase value of the zinc contents of the ore treated during the month.

Q. Does that mean what you got?

A. This quantity,—number of tons of zinc contents,—100 per cent. of zinc contents.

Q. And what does the next entry, 15 cents, mean?

A. That means that zinc was purchased in the ore on the basis of the market price of zinc of 15.457 cents.

Q. And in the third column under the——

A. (Interrupting.) That shows the value of 100 per cent. zinc contents.

Q. It shows the figures on the same line in the first column multiplied by the figures in the first line in the second column?

A. Yes, sir.

Q. And what is true of these three groups under total "This month," the same explanation is to be given to the three groups under "Last month," and the three groups under "Year to date"?

A. Yes.

Q. The entry in the line opposite "Pur. value, zinc contents,"—Pur. is the abbreviation used—does that mean the values which under the contract you agreed to pay,—that Altoona agreed to pay,—that United States Smelters agreed to pay, the vendor——

A. (Interrupting.) Well, it represents the current market price [fol. 769] of zinc on which the settlement between the smelter and the vendor was calculated.

Q. I call your attention that all these entries under the heading "Custom ore treated" that I am talking about now,—the first entry under that is "Pur. value, zinc contents,"—the next entry is "Less cost of ore," opposite "Less cost of ore," in the column entitled "This month,"—do not the first figures under "Quantity" signify the number of tons of ore treated?

A. Yes.

Q. And does not the next figure under "Average" signify average amount per ton that United States Smelting Company paid for that ore?

A. Yes.

Q. And doesn't the three groups of figures on the line under "Amount," that is simply in dollars found by multiplying the quantity in tons by the average?

A. Yes.

Q. Now, Mr. Lourie, returning to the first line of "Custom ores treated" in this typical cost sheet, we find in the three columns grouped under the heading "This month," in the column headed "Quantity," we find opposite "Pur. value Zinc contents" a certain entry in figures. Entries of that character mean pounds of zinc, do they not?

A. Yes.

Q. And those pounds of zinc were calculated in this way: The assay was taken, and the assay showed that if all the zinc in the ore was recovered, the assay showed that there was a certain amount of zinc in the ore, and if all that zinc was recovered of course it would amount to a certain number of tons?

A. I believe so.

Q. And this first entry under "Quantity" would be an entry showing a recovery of 100 per cent zinc in the ore as shown by the assay? [fol. 770] A. I believe that is correct.

Q. And then in the second column under the total average" we

find entries of cents which is the quotation, the average quotation at the end of each of the four weeks during the month as shown by the E. & M. Journal?

A. I believe that is correct. Not having used these cost sheets for a number of years, it is rather difficult for me to recall the basis of the calculations.

Q. And of course the third entry under "Amount" in regard to this "Pur. value of zinc contents" is simply the entry under "Quantity" multiplied by the entry under "Average"?

A. Yes.

Q. Giving the result in dollars?

A. Yes.

Q. As we go down under this heading "Custom ores treated," we come to the reading "Less metal loss," and when we follow along that line into the third group of the column under "This month" we find in the column under the heading "Quantity" certain figures. Do those figures indicate that in the treatment of the ore purchased during that month and smeltered there was a difference, that amount of difference there entered in pounds between the theoretical 100 per cent contents of metal and what was actually recovered?

A. Yes.

Q. And of course the decrease under "Average" in the same line is simply a repetition of the average price in the same column opposite the line "Pur. value of zinc contents," and the amount in dollars under the column "Amount" is the product of the multiplication of those two?

A. Yes.

Q. The next line under that "Custom ores treated" is the entry "Treatment" and on the same line in this group of three columns [fol. 771] entitled "This month" under "Quantity" you have certain entries, figures, which signifies, does it not, the number of pounds that during that month were actually smelted at Altoona?

A. Yes.

Q. And on that same line opposite "Treatment" in the next column "Average" you find entries of figures which signify, do they not, the cost of treatment at the zinc plant of this number of tons, the cost per ton in dollars?

A. Yes.

Q. And there again in the third column "Amount" we have the product of the two preceding figures?

A. That is so.

Q. We now come to a group of four items under the "Custom ores treated," grouped together as "Selling" one is "Freight;" one line is "Commission;" one line entry is "Interest," and one line entry is "Miscellaneous," and opposite these lines under the column "Amount" you have certain entries in dollars, and those entries signify what Altoona or the United States Smelting Company had to pay in the disposition of the products of smelting of ores during that month?

A. I don't recall what kind of interest this is. What kind of interest was that (addressing Mr. Eardley).

Q. But there was interest?

A. There was interest.

Q. So that the expenses of selling, disposal, of the metal derived from the treatment of ores during that month are found opposite those four items?

A. Yes.

Q. So far, except in the line where it says "Pur. value of zinc contents" there is nothing to indicate whether these entries apply to zinc alone, or to other metal contents as well. Is it correct to say [fol. 772] that they apply to all the metal *mon-ents*?

A. With which figures?

Q. All those except opposite "Purchase value zinc contents?"

A. Yes, I think so.

Q. In the second column under this heading "Custom ores treated," in this typical sheet, there is the writing "Less cost of ore," and on the same line under the column "Average," there are entries of dollars; where we find such entries in these cost sheets they signify the average cost of ore per ton to the United States Smelting Company; that cost included not only zinc contents, but all other metallic contents of the ore?

A. That is my understanding.

Q. Now, where this writing is "Less metal loss," such entries signify only the loss of zinc, do they not?

A. I think that is so.

Q. Now, these four items of selling, where they occur, in the absence of any special entries showing differently, apply only to the selling of the zinc contents?

A. I think so.

Q. And it is your understanding that when residues involving other metals than zinc was sold, the cost sheets indicate that by special entries which on their face show what was done, and the amounts received?

A. I know that the zinc residues credits are given effect in the statements we submitted, but I don't remember in what way these credits appeared on the plant cost sheets.

Q. Referring again to this typical sheet, I notice there is nothing in it about residues, I understand that the method of the preparation of these cost sheets was to enter in the profit and loss statement [fol. 773] residues not in the month of their recovery but in the month of their sale?

A. Yes, that is my understanding of the practice.

Q. So that in some of these we find, do we not, the entries of residues—

A. (Interrupting.) Yes.

Q. (Continuing:) In the profit and loss statement, but where those residues are entered, it does not at all signify that those residues were the recoveries from the ores handled that month?

A. No.

Q. Now, directing your attention on this typical sheet to six items under "Custom ores treated,"—"less metal loss,"—"Treatment," and then the group of "Freight," "Commission," "Interest" and "Miscellaneous," grouped together under the word "Selling," did you eliminate the entry in the third column under the heading "Amount" of the group of columns called "This month," and add together the remaining five items under "Treatment," "Freight," "Commission," "Interest" and "Miscellaneous" you get the actual total cost to the smelter of handling the ores that month and marketing the zinc content of those ores?

A. That is right.

The sheet in regard to which the witness has testified as a typical sheet is the cost sheet of the United States Smelting Company, Altoona zinc plant, "Statement of profit and loss," December 15,—being page 3.

Q. Taking this month of December 1915, as fairly typical,—which it is, is it not?

A. I believe it is.

Q. What we have called cost sheets which you have produced here are bound according to months are they not?

A. Yes.

[fol. 774] Q. And they include not only sheets which have reference to the Altoona Smelting plant and the Iola plant, but to other affairs,—other plants?

A. Yes.

Q. But the data referring to the Altoona plant are grouped together, are they not?

A. I think so.

Q. In consecutive sheets or intended to be?

A. Intended to be so.

Q. And that is equally true of the Iola Plant?

A. Yes.

Q. And the description that you have given of this typical sheet we have been discussing of Altoona would apply, the names being changed, to the Iola sheets during the period that any of the Beer-Sondheimer ores were smelted there?

A. I think it would.

Q. The sheets here, both the statement of profit and loss and the detailed analyses of various data in connection with the Altoona Plant from the end of June, 1915 to the end of September, 1916, cover the entire period during which any of these so-called Beer-Sondheimer ores were smelted at Altoona, as you understand it?

A. As I understand it from information. I have no personal knowledge of the months in which Beer-Sondheimer ores—I mean Mammoth ore was smelted.

Q. And these sheets in regard to the Iola plant during February and March, 1916, cover the period during which Beer-Sondheimer ores, the entire period during which Beer-Sondheimer ores were smelted at Iola, as you understand it?

A. As I understand it from information given me.

Mr. Jerome: I offer in evidence all the sheets that refer to Altoona [fol. 775] during the period July, 1915 to September, 1916, both inclusive, and also the sheets which have reference to Iola during the months of February and March, 1916.

Mr. Stockton: I make the same objection that I have already made to this same line of testimony.

The Master: Same ruling.

The sheets offered are part of Defendant's Exhibit C, being a large volume of cost sheets produced from the Boston office of the United States Smelting, Mining and Refining Company.

Q. Mr. Laurie, in what way was the spelter recovered from the ores at these smelters at Iola and Altoona—in what way were they marketed and through whom?

A. It was sold through the New York office of the corporation.

Q. The New York office of the United States Smelting, Mining and Refining Company?

A. Yes.

Q. And who was it that had charge of those sales, the name of the man, was it Robertson?

A. I am just trying to remember what the conditions were in 1915. I think Mr. Robertson was selling metals at that time. I have forgotten.

Q. And sales would be made for future deliveries, wouldn't they?

A. In many cases; perhaps in most cases.

Q. In most cases where you had, the Altoona Smelter for instance, bought a considerable quantity of ore, you knew about what amount of zinc would be recovered from that ore, and you would sell against that prospective recovery?

A. I don't know, I could not say; I don't know whether that was the policy or not.

[fol. 776] Q. The records in reference to those sales, the Altoona and Iola Smelters, where are they, during the period we have been discussing—that is the Beer-Sondheimer ores?

A. The sales appear in these cost sheets, not in detail, but I think in monthly totals.

Q. It is true, for instance, in this particular sheet of December, 1915, that production and sales of the United States Smelting Company's Altoona Zinc Plant formed a portion of one of these cost sheets. It says here "Shipped Sold," a certain number of pounds of zinc at a certain price, amounting to a certain number of dollars, but they in no way indicate the time when the contract for the sale of that zinc was made, do they?

A. No, they don't.

Q. And what is the price we find here when the price is entered after "Shipped and Sold." Is that a quotational price, or is it a contractual price, or what?

A. That is the contract price at which the metals—at which these metals were sold.

Mr. Jerome: That is all.

Redirect examination by Mr. Stockton:

Q. Where, on the sheet that Mr. Jerome has been examining you about the words "Operating profit" appear, is that the same operating profit that is transferred onto the summary in Defendant's Exhibit B?

A. Yes, it is.

Q. When you calculated the depreciation of the Altoona plant, did you do it by taking the total number of tons of ore smelted at the plant during its ownership by the United States Smelting Company, and take that proportion of that tonnage that was smelted during the period shown on Defendant's Exhibit A, and pro-rate the loss sustained by the sale of the property in the proportion of the tonnage actually smelted during this period compared with the total tonnage smelted?

A. Yes, that was the method I used.

Q. What was your reason for using that basis in ascertaining the depreciation?

A. That seemed to be the fairest basis of apportioning the loss because the tonnage which—

Q. (Interrupting.) Did the actual treatment of ore cause any depreciation in the property?

A. The depreciation would be caused partly by treatment of ore and partly by other causes. That seemed to be the fairest basis to pro-rate the whole cost of the plant less the salvage value at a per ton rate.

Mr. Jerome: In these cost sheets, were any figures found here that represent current depreciation?

The Witness: No, I don't think there is any depreciation at all in these cost sheets.

Mr. Jerome: Were there current depreciations carried on your books?

The Witness: Not on the plant books.

Mr. Jerome: There were in the books of the parent company?

The Witness: On the books of the parent company we took no cognizance of depreciation until the end of 1915, when we made an arbitrary charge to take care of the depreciation and amortization which we expected to be large in this case.

[fol. 778] Mr. Jerome: As you ran along from time to time the question of Federal taxation came up. Did you consider in your reports to the Internal Revenue Commissioner an element of deterioration in these plants?

The Witness: At the end of 1915 we claimed a large sum for depreciation, a sum in round figures. The Tax Examiners took exceptions to that basis, and it has not yet been settled as to just what depreciation will be allowed on these plants, but it is admitted, I think, that we will get the whole cost of the plant less salvage value as a charge against taxable income, either in the form of depreciation or in the form of a loss chargeable at the time the plant was sold.

By Mr. Jerome:

Q. When filing your returns from time to time you did make a claim for depreciation, did you not, in these plants?

A. In the returns we originally filed we did on the basis of round sums. Later on we filed amended returns.

Q. Your amended returns were filed after the plant had been scrapped or sold?

A. They were filed after the plant had been scrapped.

Q. But the verified returns filed when the plants were being operated by you, did contain, either alone or combined with other items, an item of depreciation for the preceding year on these two plants?

A. Yes.

Q. On each of these two plants?

A. Yes, sir.

Q. And how did those items of depreciation on each of those plants [fol. 779] compare with the element of depreciation, proportion of loss on sale of plant found in Exhibit A. Did you claim a greater or less amount?

A. I think in the original reports for the year 1915, and possibly as to 1916, we claimed a greater amount than the loss on the plant, but I would not like to say so definitely unless I have some figures here to refer to. I knew we charged off a very large sum for depreciation at the end of 1915, greater, I think than the amount which I have deducted as proportion of loss of plant.

Q. In this Exhibit A what you charge off for depreciation during that year on the Altoona plant, is the amount of \$159,970.79?

A. Yes.

Q. Or is that the depreciation for the whole period of your ownership of this plant?

A. That is the pro-rated proportion of the depreciation which would be applicable to the period up to September, 1916.

Q. That is, you took the entire depreciation or loss on this plant shown in Schedule C of Exhibit A, namely, \$261,485.50, and pro-rated that by length of time, or did you pro-rate it by tonnage?

A. Yes, not by time.

Q. Handled during the period July 1, 1915 to September 30th, 1916, both inclusive?

A. Yes, I calculated the tonnage—I took the whole tonnage smelted at the Iola plant, and divided that tonnage into the total loss realized on the sale of the plant, which gave a rate per ton for depreciation, and applied that rate to the tonnage smelted during the period up to September, 1916.

By Mr. Stockton:

Q. Does the average figure of \$80,794 per ton on Defendant's Exhibit A represent the average profit per ton handled during the [fol. 780] period from July 15 through September, 1916, on all kinds of ore?

A. Yes, that is the average on all kinds of ore—carbonate and sulphide combined.

Q. Was it more expensive to handle sulphide than carbonate ores?

A. It was.

Q. Did you make computations showing the additional expense involved in handling the sulphide ores?

A. Yes.

Q. Is that noted there?

A. That is noted in one of the schedules attached to the exhibit.

Q. What caused the additional expense in connection with handling sulphide ores?

A. The necessity of roasting the sulphide ores, which was not necessary in the case of carbonate ores.

Q. In this Schedule D, attached Defendant's Exhibit A, it merely computes the cost of roasting the sulphide ores?

A. Yes.

Q. And what does that give you as the net profit per ton for handling sulphide ores treated during that period from July, 1915 to September, 1916?

A. \$6.6223 cents per ton.

Q. You testified that the cost sheets showed that your profit on Custom ores showed a loss during the month of July and August, 1916. As a matter of fact, if you had distributed the additional items of expense, in the form of interest on working capital, proportion of administration, interest on investment and the proportion of loss on the sale of the plant over the month in question, would you have had a net loss on any other months?

A. I cannot be absolutely sure of that, but I think that in such months as February, 1916 and September 1916—

Q. (Interrupting.) And September, 1915?

[fol. 781] A. September, 1915, April, 1916, we might have shown losses. We cannot answer that definitely without making some calculations. I cannot calculate it offhand very well, but I should think that answer is substantially correct.

Mr. Stockton: That is all.

Recross-examination by Mr. Jerome:

Q. In this defendant's Exhibit A, I find at the bottom of the first sheet "Profits per ton on sulphide ores"—\$6.6223 per ton, that is correct, is it?

A. Yes, that is so.

Q. The margin of profit was greater on sulphide ores than it was on carbonate, was it not?

A. I don't know.

Mr. Jerome: That is all.

WALTER H. EARDLEY (recalled).

Direct examination by Mr. Tibbetts:

Q. Mr. Eardley, were these costs sheets of the Altoona plant which have been referred to here and offered in evidence, prepared in the office at Kansas City, of which you had charge?

Mr. Stockton: I make the same objection as before to this testimony.

The Master: Objection overruled.

Mr. Stockton: Exception.

A. Yes.

[fol. 782] Q. And were you familiar with the cost sheets and the preparation thereof?

A. Yes, sir.

Q. Referring to this typical sheet, which is the sheet headed "Altoona Zinc Plant. Statement of profit and loss—December, 1915," sheet 3, the first line of entries under the head "Custom ores treated," reading "Pur. value zinc contents," contains figures which I think the previous witness said referred to the price, namely, 15.457 cents. Is that the actual price paid for the ore?

A. No, sir.

Q. That is merely an assumed price?

A. That represents the Engineering and Mining Journal price for the week of receipt at the plant of the ores treated during that month.

Q. And is not necessarily the price at which you settled for the ores?

A. It is not the price we settled for the ores.

Q. The next line "Less cost of ore" in the same column has the figures 51.5 cents. Does that mean 51.5 cents per ton of ore?

A. Yes. That represents the amount, that is the average cost per ton treated during that month.

Q. And that is the actual cost you paid for the ore in question?

A. Yes.

Q. Turning to the following sheet, which is headed "Altoona Zinc Plant." Production and Sales December, 1915"—sheet 4, which contains the figures in regard to quotational loss, will you please explain from what elements the so-called quotational loss was calculated?

A. When a lot of ore was received at the plant, the quotations in the Engineering and Mining Journal for that week was the price used in calculating the assumed value of the zinc contents of that particular lot.

[fol. 783] Q. And that price, as you have already said, was not the actual price you paid for that ore?

A. Was not the actual price, but was an assumed value of the zinc content. We would then take the average price as shown in the Engineering and Mining Journal for the month, and compare with this the price of the week of arrival to reflect a quotational loss or

gain as far as the purchasing department was concerned. We would then take the Engineering and Mining Journal price for the month, and compare that with the actual price received in the sale of the metal to arrive at the quotational loss or gain, which, theoretically, is supposed to represent the ability of the selling department—it would reflect as to whether or not they secured as much for the spelter as the Engineering and Mining Journal reported as the price for that particular month.

Q. Well, the quotational loss or profit, as I understand you to say, was the difference between the two sets of spelter quotations, first, the average quotation—was it the average for the month, or the particular quotation for the week of arrival?

A. The Engineering and Mining Journal week of arrival.

Q. It was an assumed price, and not the actual price you paid for the spelter?

A. Yes, sir.

Q. And on the other hand the monthly quotation of spelter for the same month, which was not the actual price which you received for the spelter?

A. Yes, sir.

Q. And in other words, the quotational profit or loss was merely the difference between two assumed sets of figures?

A. No, sir, that is not so. The one part of this quotational profit or loss is, as you say, but it is divided into two parts, and the net [fol. 784] result is the difference between the E. & M. J. price for week of arrival, and the price actually received for the metal; that is the net result.

Q. Referring to this sheet, marked 4, where does that result which you say is the net result appear?

A. (Witness examines paper.)

Q. You refer to the last line reading "Net quotational loss" under the column headed "Price."—\$1.958, under the column headed "Value"—\$46,234.03. Is that what you refer to?

A. Yes.

Q. How are those figures derived?

A. The value of the ore is computed on the basis of the E. & M. J. price for week of arrival of each lot. Taking the one hundred per cent. of the zinc contents of the ores treated during the current month, at that price in the month of December, gives a figures of \$390,180.40.

Q. That is an assumed price?

A. Not an assumed price, an assumed value.

Q. It has no relation to the actual amount you paid in settlement for that ore?

A. No, sir. We deduct from that assumed value the loss in smelting, figuring the pounds loss at the same price. That gives an assumed value of the recovered contents for the month of \$309,240.30.

Q. Being the item in the third line of this page under the heading "Value"?

A. Yes. At the beginning of the month we had on hand a small

quantity of spelter, namely, 254,441 pounds, which was taken into our accounts at the price appearing on the previous months' statements for the same item.

Q. What is that price in this instance?

A. 14.019.

Q. And was that an assumed price which you applied to that ore as practically an inventory value at the end of the previous month?

A. Yes, sir.

[fol. 785] Q. Go on.

A. We purchased from the Big Four Exploration this month slightly over 50 tons of spelter at 18 and one-half cents a pound.

Q. Was that under the contract which has already been marked in evidence here?

A. Yes. It amounted to \$18,508.32. The figure appearing on the fifth line under the column headed "Value." The total of the three items immediately above the line under "Total available spelter" gives the total spelter available for shipment during the month and the total value.

Q. Will you read that entry "Total available spelter"?

A. 2,355,078 pounds of zinc. The total value, as computed above, is \$363,418.70. This amount divided by 2,355,078 pounds, gives an average assumed value per pound of 15.431 cents.

Q. You then go down to the item "Shipped and Sold"?

A. Yes. That represents the amount of spelter shipped out from the Altoona Zinc Plant during the month of December under contracts, with the exception of slightly over 50 tons transferred to the Iola plant.

Q. What is the item "Shipped and Sold"—what is the amount shown there?

A. 1,920,448 pounds, from which we realized 267,606.97, making an average selling price for the spelter of 13.929 cents per pound. We sold or transferred to the Iola plant 100,045 pounds at 11.41 cents per ton. After shipping the 1,920,448, and transferring to Iola 100,045, and using for experimental purposes 119 tons, we had on hand at the end of the month 334,466 pounds. We take this into account at a figure we thought would approximately represent the amount we would receive for that spelter when shipping under the contracts for the succeeding month; that was at 11.41 cents per [fol. 786] pound. Adding the amounts received for the sale of spelter, and the value of the spelter on hand at the end of the month, we get \$317,184.67, as the actual value of the spelter shipped that month and on hand at the end of the month. This amount divided by 2,355,078 pounds gives an average price of 13.516 cents per pound, which is the actual amount per ton realized in the sale of the spelter.

Q. Is that exactly correct? Doesn't that include this assumed figure 11.41 cents as the value in your inventory at the end of the month.

A. Yes. Now, we deduct this actual value of the spelter from the assumed value on the sixth line following the words "Total available spelter" to secure a quotational loss. On the line starting with "Produced at purchase price," we have 2,592,000 pounds.

Q. That is the same item you already had on the third line of the sheet?

A. Yes, it represents the recovered spelter for the month at the price for the week of purchase which is 15.457. Let me change that. The produced at purchase price, the items following, are the same as the items on the third line both as to pounds, cents per pound and amount. On the line immediately following that is the same amount of spelter figured at the average E. & M. J. price for the month.

Q. Which in this case—

A. (Interrupting.) Which in this case is 15.221 cents per pound.

Q. Or two hundred and thirty-six thousandths of a cent less than the estimated purchase price which appeared above. Is that correct?

A. That is less than the price for the week of arrival.

Q. Which was an assumed price or value?

A. I don't call it a purchase price.

[fol. 787] Q. An assumed value?

A. An assumed value. So that makes a quotational loss as between that price and the Engineering and Mining Journal price for the month of .0236 cents per ton, or \$4,730.19.

Q. That is one element of your quotational loss?

A. That is one part of the quotational loss of \$46,234.03.

Q. Where does the other part come in?

A. Immediately following that. On the next line we have a metal recovery during the month at the E. & M. J. price for the month, which is 15.221 cents per pound, having a total value of \$304,510.11. We had on hand at the first of the month 254,441 pounds, which was carried on the previous month's report at 14.019 cents per pound, giving that product a total value of \$35,670.08. We purchased from the Big Four 100,045 pounds at 18½ cents per pound, giving that a total value of \$18,508.32, making a total of pounds 2,355,078, with a total value of \$358,688.51. and dividing this amount by the total pounds we get an average price of 15.23 cents. The actual price realized shown on the next line for the 2,355,078 pounds was \$317,184.67, which is at the rate of 13.516 cents per pound, showing a quotational selling loss as between the amount realized and the E. & M. J. price for the month, with the two exceptions already noted, of \$41,503.84; that amount added to the \$4,730.19 above noted, or previously noted, gives a total quotational loss of \$46,234.03.

Q. One of the elements that entered into that so-called quotational loss for that month was the fact that you included 100,000 pounds of spelter you bought from the Big Four at 18½ cents per pound?

A. Yes.

[fol. 788] Q. Because you have bought that spelter from the Big Four at 18½ cents a pound, you charged all that spelter which you figured that month with its proportion of the so-called quotational loss on the month's operations?

A. I think so, if I understand your question.

Q. Do you know when the contracts were made under which you shipped spelter during this month?

A. No, I don't.

Q. Is there any record-available here which would show that?

A. I assume that Mr. Roberston would have a copy of the contracts.

Q. I mean here before the Master?

A. No, sir.

Q. You are familiar; were you, with the sales that you made from time to time for the spelter at the Altoona plant?

A. Yes.

Q. And you were in touch with Mr. Robertson in negotiating those sales?

A. Yes, sir.

Q. Was it customary to sell from time to time practically against the ore that was then coming in?

A. It was customary to sell a large part of the prospective production of smelters in advance.

Q. During this period did you sell spelter beyond the actual contents of the ore that was on hand?

A. Very often.

Q. And you based that on what you expected to receive under your contracts for ore?

A. Yes, sir.

Q. That involved the risk that the mines would not deliver, or the mines or smelters would not deliver under their contract?

A. Yes, sir.

Q. Do you know whether contracts were made in the summer of 1915 for spelter against the Kennett Ore?

A. I don't recall any; I could not say; I don't remember.

Q. Isn't it a fact that as soon as you made the arrangement to [fol. 789] receive the Kennett Ore from the Mammoth Copper Mining Company that you immediately negotiated the sale of spelter that you expected to get from the ore?

A. I would say at that time we expected to operate the plant at capacity, and in making our spelter sales we took into consideration the output of the plant rather than any particular ore.

Q. And did you in the summer of 1915 contract for practically the capacity of your plant for the next few months?

A. For a considerable portion of the capacity of the plant.

Q. During the ensuing few months?

A. Yes, we sold considerable spot.

Q. You mean by "spot" spelter for immediate delivery?

A. Yes, sir.

Q. And did you also contract for a large quantity of future spelter for delivery?

A. Yes, we often sold three months ahead, and occasionally,—I don't know whether this would apply to the summer of 1915, but occasionally we sold as far as six months ahead.

Q. You are clear that you sold three months ahead during the summer of 1915?

A. I would think that would be a safe assumption.

Q. And so far as those contracts were concerned the only risk you

look was that the ore would not be forthcoming, or the smelters would break down in treating it?

A. Yes.

Q. So that whatever happened to the market price for spelter you were taking no risk in that regard. To the extent that you had made contracts,—had contracted for future deliveries of spelter the price was fixed?

A. Yes.

[fol. 790] Q. To the extent of those contracts you assumed no risk through a falling spelter market?

A. No, sir.

Q. And you have made such contracts for a large part of the estimated output of your smelters?

A. I should say during the summer of 1915 we did contract for a large part of the production. I don't know just what months. I know in September 1915, for example, we sold quite a bit of spelter: there was a reaction in the market at that time. It had been down to ten, and reacted to sixteen, and I remember selling considerable spelter,—some spelter.

Q. Before it could go down again?

A. Yes.

Q. Isn't there a larger margin of profit in handling sulphide ores than carbonate?

A. I could not give any general idea. It depends on one's buying ability.

Q. To which did you give the preference in buying?

A. Our roasting capacity was limited. We purchased all sulphide ores that we could use based on the roasting capacity. What sulphide ores we could not use we filled in with carbonate ores.

Q. In other words you simply purchased carbonates to fill in the excess over your roasting capacity?

A. Yes, that is true, but that amounted to considerable.

Q. And you took the sulphide ores up to your roasting capacity because you considered them profitable to treat, isn't that a fact?

A. Well, that depends on the ores, I remember one year we purchased carbonate ore from the Western Mining Company which we got at a very light figure. I don't know whether there was more margin in the sulphide ores in that particular year.

[fol. 791] Q. In general, isn't there a considerably large margin of profit in sulphide ores that you bought during this period than in carbonates?

A. Generally speaking, I should say there was a little more profit.

Q. Isn't there a considerable more profit?

A. I would have to look at the contracts covering this particular period. At this particular time there was a large profit in carbonate ores in the summer of 1915. Later on, in 1916 and 1917, we had to pay a higher price for carbonate ores than we did in 1915.

The Master: So the relation of profit between carbonates and sulphide was changed from what it had been in 1915?

The Witness: Yes.

Q. Did you have any carbonates at all where there was a smelting margin of \$60.00?

A. I don't know.

The Master: What do you mean by smelting margin?

Q. What is a smelting margin?

A. Smelting margin, as the treatment is generally used, covers the cost of smelting, the cost of freight on the spelter from the smelter to East St. Louis, the selling commission on the spelter, and the profit.

Q. In other words that is the difference between what the ore cost you and what you expect to realize net from the metal?

A. Yes.

Q. And includes the cost of smelting and profit to be derived from smelting?

A. Yes, sir.

[fol. 792] Q. Will you answer the question, my other question now?

A. I don't know.

Q. Do you recall any such?

A. I think we did have some carbonate ores that gave that much. I don't recall just now.

Q. Are there any records in existence which show the recoveries from this Kennett Ore?

A. Not the Kennett Ore separately from the others.

The Master: It was not roasted separately.

The Witness: It was roasted separately.

Q. It was only mixed with other ore, I think you testified, during this period, at least this period up to February, 1916, and that was the Green Monster ore.

A. No, I think I testified that up until the 27th day of December, 1915, we only treated this ore with Green Monster. That was the date we had a cut-off, and decided to pay Kennett for the residues direct rather than handle them for their account, after that time why we mixed the ore with other ores we were treating.

Q. During the period up to December 27th, 1915, didn't you receive reports from the smelters showing what your recoveries were from this ore?

A. We received daily reports showing the furnace recoveries on roasted product, but we received no report showing recoveries for the month on any particular ore,—from the crude ore.

Q. Could not you base upon those reports which you received, and estimate quite closely the percentage of recoveries you had got from the Kennett ore?

A. And estimate fairly closely.

Q. Did you make such an estimate?

[fol. 793] A. Not that I recall. I looked over the statements as they came in daily. I estimated they had probably a two per cent roasting loss and made such deductions.

Q. Can you tell now, approximately what the average recovery was from the Kennett ore during that period?

A. No, I cannot.

Q. Would it differ substantially from the general recovery shown in these cost sheets?

A. I don't think so.

Q. Would it be safe to assume that the recovery from the Kennett ore would be substantially the same as shown in the cost sheets for the ore treated?

A. I think that would be a fair assumption.

Q. If you did not keep a separate record of the Kennett ores, how could you keep separate the residues from them?

A. Well, very easily. We were running certain furnaces. At times we kept two furnaces on Kennett ore. All of the residues from those two furnaces would go into one pile, from which we would ship the residues to the American Smelting and Refining Company, but we never received monthly reports showing the net recovery on any particular furnace from the crude ore for that month. We just had the furnace reports.

Q. But didn't you have daily or weekly reports showing the amount of spelter from a particular furnace?

A. No, sir, we only had one report showing the recovery; that was for the plant for the month.

Q. Didn't each furnace,—wasn't there a report kept of each furnaces' operations?

A. No, we received a daily report of each furnace. That was based on the assay of the roasted ore and the weight of the roasted ore, [fol. 794] and did not reflect the loss sustained in roasting or the loss sustained in handling about the plant.

Q. It showed the recoveries, didn't it?

A. I would say the recoveries from the roasted ore based on the assays of the roasted ore taken at the plant there.

Q. And you said that the loss in roasting was only about two per cent?

A. I should assume around that.

Q. What was the loss in handling the ore around the plant?

A. Very small.

Q. So by taking into account two per cent loss in roasting, could you not tell from these daily reports what the recoveries were of the individual furnace?

A. I could only make a rough calculation. They took grab samples from the roasters each day, and assayed them, and used those assays to figure out the metallic content of the roasted material and it was not an accurate sample, so it was only a rough calculation.

Q. You say you received a monthly report of the spelter recoveries. From whom did you receive that?

A. The plant superintendent.

Q. And didn't the plant superintendent keep a separate record for each furnace?

A. No more than the one transmitted to Kansas City, to which I have referred.

Q. What was done with these daily furnace reports that you received, were they filed?

A. They were filed.

Q. Could not you tell from a series of those daily reports for furnaces which were being set aside for Kennett ore almost exactly what the recoveries were from Kennett ore?

A. No, sir.

Q. Couldn't you tell how much spelter those furnaces were turned out?

A. I could tell the amount of spelter turned out.

Q. You knew how much ore went into them?

A. No, sir, not always.

Q. How could you keep separate records for the residues for particular lots of ore if you did not know what became of those lots of ore?

A. We kept one or two furnaces constantly on Kennett ores, and all residues were put aside in one pile without knowing of the recovery connected with any particular car of Kennett ore, or a particular batch.

Q. On the Kennett ore there you knew how much spelter you got, did you not?

A. I suppose one could take the daily statements and, and one might be able to figure out the amount of spelter recovered from certain bins of Kennett ore containing certain carloads. We never did that.

Q. Did you keep there an accurate record just when each carload of Kennett ore was smeltered?

A. No, we did not.

Q. Did you not with the residue reports, keep a record of when the particular lots were smelted. I thought the testimony gave that impression certainly that a record was kept of residues with reference to each shipment of ore?

A. Let me tell you. We had bins and stock piles as the Kennett ore would come in. It would go into a certain bin or it would go into a certain stock pile. I remember at one time we had a stock pile of Kennett ore around about 1500 tons. We knew what cars went into that stock pile, but we did not know what cars were going into the furnace or into the roasters. When that stock pile was cleaned up we knew we had smelted all those ores. We would not [fol. 796] know what ore was smelted until the stock pile was entirely cleaned up and that might go on for over a year.

The Master: The identity of the ore was lost when the ore went into a stock pile or bin?

The Witness: Yes, it was.

Q. With reference to the particular cars which entered into a particular furnace lot, is there any record which shows either on a daily, or weekly or monthly basis the amount of spelter recovered from the Kennett ore so that by adding together the figures shown on a series of such records we can get the total amount of spelter recovered from the Kennett ore?

A. You are referring to the ore involved in this suit.

Q. I do.

A. I know of no record and I know of no way you can calculate that.

Q. Why did you ask if it refers to the ore involved in this suit. Is there any record of the total spelter recovered from the Kennett ores?

A. The daily report will show the spelter recovered from all Kennett ores handled separately in a separate furnace, but there were ores treated with other ores, and how much of the spelter came out of the Kennett ore, and how much out of the carbonate ore mixed with it I don't know, and nobody else can tell; so there is no way of getting at the amount of spelter out of the ore in this action.

Q. You said there were two furnaces set aside for Kennett ores, didn't you?

A. For different periods.

[fol. 797] The Master: How much can you identify, how many monthly reports, you said from September to December?

The Witness: Yes.

The Master: After December, 1915, you began to mix it?

The Witness: Yes.

Q. Are those daily records in existence?

A. I don't know.

Q. Where would they be?

A. I think they would be at Baxter Springs, Kansas.

Q. Is there any way they could be produced?

A. If they are there they can be produced?

Mr. Tibbetts: That is all.

Cross-examination by Mr. Stockton:

Q. Does Mr. Metcalf's statement refresh your recollection as to recoveries on the Kennett ore?

A. No, sir.

Q. In this matter of the quotational profit and loss, is the figure which is shown on Defendant's Exhibit A, as the quotational profit and loss, the net figure which appears at the bottom of the cost sheet, page 4, for the month of December?

A. Yes.

Q. Is that figure arrived at by taking the actual purchase price of the ore by two processes, first taking the actual price of the ore, and comparing that with the average Engineering and Mining Journal price for that month for spelter?

A. No, that is not the first process. The first half of the process is taking the E. & M. J. price for the week of arrival of these cars [fol. 798] loads and comparing that with the E. & M. J. price for the month.

Q. Now, in that page 4 headed "Net quotational loss," you have a

figure "Produced at purchased price." That is the amount of zinc produced during the month, isn't it?

A. Yes.

Q. At its actual purchase price?

A. No, sir.

Q. What is it?

A. It is based on the E. & M. J. price for the week of arrival of each lot.

Q. What did you put that purchase price at?

A. To reflect the value of the ore at the time it arrives at the plant.

Q. As a matter of fact, didn't most of your contracts provide for payment on the basis of the spelter price in the week of arrival?

A. Most of our contracts provided a limit on the spelter price.

Q. But did they provide on a basis of spelter price each week of arrival?

A. Probably a majority of them did.

Q. You say "Produced at purchase price." What do you mean?

A. The actual amount of spelter produced at the plant.

Q. At the E. & M. J. price for the week that the ore arrived at the plant?

A. Yes, taking each lot separately.

The Master: That is what you call the purchase price on that line, is it— "Produced at purchase price"?

The Witness: Yes.

The Master: It is not the actual price. It is the Engineering and Mining weekly price?

The Witness: Yes.

The Master: I mean by actual price the actual price you paid. [fol. 799] It is not the actual price you paid.

The Witness: No, sir.

Q. As a matter of fact, in a majority of contracts, the actual price you paid was influenced by the E. & M. J. price in the week of arrival of the ore?

A. Yes.

Q. On that Defendant's Exhibit A, how is the figure under the column "Operating profit" arrived at?

A. That is arrived at by taking the assumed value of the spelter in the ore, which is based on the E. & M. J. price for the week of arrival at the plant, and deducting from the assumed value of the recovered contents, the actual cost of treating the product, which is a hypothetical profit. It is not an actual one.

Q. Is the actual cost of the ore deducted?

A. Yes, sir.

Q. That is deducted along with the cost of treatment?

A. Yes, sir.

Q. And the difference between the cost of the ore, plus the cost of treatment, and the Engineering in Mining Journal price for the week of the arrival of the ore, constitutes what you call "Operating profit"?

A. Yes, sir.

Q. And then you have a thing called "Quotational loss or profit," which is the difference between the value of the product at the Engineering and Mining Journal price for the week of the arrival of the ore and the sale price?

A. Yes, sir.

Mr. Jerome: The actual sales price?

The Witness: The actual sale price.

[fol. 800] Q. And then a comparison of the operating profit and the quotational profit or loss will give you the actual net profit or loss?

A. Yes, sir.

Q. The actual loss sustained by the company or the actual profit made by the company?

A. Yes, sir.

Q. Is there any separation in those cost sheets showing average percentage of recovery on sulphide ores and on carbonate ores?

A. No, sir.

Q. The average percentage of recovery there is the average of both sulphide and carbonate all lumped together.

A. Yes.

Q. As a matter of fact your roasting capacity was not sufficient to enable you to run your plant on sulphide ores alone was it?

A. No, sir.

Q. Can you tell me about whether the usual price of carbonate ores was higher or lower than the price of sulphide ores?

A. As a general thing I should say that it is a little higher than sulphide ores, but there are exceptions.

Q. But as a general thing they were higher?

A. Yes.

Mr. Stockton: That is all.

The volume containing the cost sheets, about which testimony has been directed may be known as Defendant's Exhibit C.

JOHN LAURIE (recalled for plaintiff):

By Mr. Stockton:

Q. Have you ascertained the amount which is deducted by the [fol. 801] United States Smelting Company in its Income Tax report for the year 1915, as depreciation on the plant at Altoona?

A. Yes, I find we deducted a lump sum for depreciation of all the zinc Plants combined, and of that sum we allocated \$200,000 on the books as being the depreciation applicable to Altoona for the year 1915.

Q. How much did you allocate to Altoona as such deduction for depreciation during the year 1916?

A. 1916 I think it was about \$61,485.50, which was practically the balance of the value of the plant. The \$200,000 is at the rate of \$10 per ton on the ore treated up to the end of 1915.

Cross-examination by Mr. Jerome:

Q. The total cost of the plant, Mr. Laurie, as shown by schedule C, of Defendant's Exhibit A, of the Altoona plant together with the additions up to March 31, 1917, appears to be \$277,444.71. As I understand you, in your Income Tax returns you claimed a deduction almost as great as the purchase price of the plant—\$225,000?

A. That is according to the record, the statement I have here, that is so. I haven't got the books of the company beside me, but I am pretty well satisfied that \$200,000 was the amount we wrote off for Altoona in 1915.

Q. After this date, June, 1915, when you purchased the plant, and after the additions which you made to it up to March 31, 1917, you continued to own and operate the plant until the month of February, 1918, did you not?

A. There were very few operations, as I recall if, after 1917.

Q. What was the gross income reported to the Government that [fol. 802] you returned from this plant during this period that you claimed this deduction from the Federal Government?

A. The gross income, I haven't got that figure here, but these figures which appear on the Exhibit would be included in the gross profit which was reported to the Government.

Q. Has that return been allowed by the Government and assessment made?

A. It is still under review, an amended return having been filed.

Mr. Stockton: Plaintiff rests.

Mr. Jerome: The defendants do not desire to introduce any testimony, and on that theory they will rest their case. It may be, we do not think it is at all likely, but of course it is within the range of possibility that in examining these various exhibits that are here, we may ask the Master to reopen the case for some brief testimony on some particular point, but we do not anticipate that, and we think we speak with a good deal of assurance when we say there is very little probability of that taking place.

The Master: We will face any such situation when it comes up.

Case closed.

[fol. 803] DISTRICT COURT OF THE UNITED STATES IN AND FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

District of Colorado

DENVER DEPOSITION

CITY AND COUNTY OF DENVER,
State of Colorado,
United States of America, ss:

EDWIN ANDERSON, of the City and County of Denver, State of Colorado, residing more than one hundred miles from the place [fol. 804] where the trial of this action will occur, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

Charles W. Stockton, Esq., appeared by George L. Nye, Esq., for the plaintiff, and Francis C. Caffey, Esq., United States Attorney for the Southern District of New York, appeared by Harland B. Tibbetts, Esq., for the defendant Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America.

Direct examination by Mr. Nye:

Q. Your full name is Edwin Anderson?

A. Edwin Anderson.

Q. You reside in the City and County of Denver and State of Colorado?

A. Yes.

Q. What is your business or occupation?

A. I am business manager for The United States Zinc Company in Colorado, and also business manager for The American Smelting and Refining Company in Colorado.

Q. How long have you been connected with The United States Zinc Company?

A. To the best of my recollection, since 1903.

Q. And how long have you been manager of that company?

A. I do not know just when my title was changed. I have practically performed the same duties ever since I went there—that is, ore buyer; I have been ore buyer for The United States Zinc Company, since 1903.

Q. Were you familiar with the current market prices for zinc ores in the year 1915?

A. Yes.

[fol. 805] Q. Were you familiar with such current market prices

for zinc ores between the 12th day of March, 1915, and the 26th day of February, 1916?

A. Yes.

Q. Now, Mr. Anderson, I hand you a letter sheet, which has been marked for identification Plaintiff's Exhibit 40 in connection with your deposition, which sheet is further identified by your signature upon the margin thereof, and ask you to examine that sheet and the terms and prices quoted therein in respect to zinc ore purchases and sales, and after you have examined those figures, considering the period from March 12, 1915 to February 26, 1916, state from your knowledge of the market prices of zinc ores then current whether the terms stated in Exhibit 40 are and were, in your judgment, fair and reasonable prices for the period mentioned.

Mr. Tibbetts: I object to the question on the ground that the witness has not been properly qualified with respect to the particular ore and prices referred to in the question and in the exhibit; and on the further ground that the question is too indefinite as to time and place and as to the conditions under which the prices were to be made.

A. I would say that the price is fair and reasonable for ores at that time.

Mr. Tibbetts: May I add to my objection, on the further ground that the question is improper in form, too general, and calling for a conclusion.

[fol. 806] Q. State whether or not you were buying zinc ores during that period?

A. I was.

Q. In what quantity?

A. About 3,000 tons per month at that time.

Q. You have stated that the prices referred to in Exhibit 40 seem to you to be fair and reasonable. Upon what do you base that estimate.

Mr. Tibbetts: The same objection.

A. On prices that The United States Zinc Company were paying at that time.

Q. Do you now call to mind any specific parties from whom you were buying zinc ores at that time?

A. Yes, I have a list here.

Q. Will you name some of those parties?

A. I will take them in the chronological order that I have them here. In July, 1915, we purchased from the Daly-West Mining Company, Park City, Utah, a certain tonnage of ore.

Q. You may state the price you paid.

A. For which we paid \$23.00 per ton, delivered at Blende, Colorado, which is near Pueblo.

Q. On what basis of spelter at St. Louis?

A. \$5.50 St. Louis spelter, and it was also based on certain silver and lead contents.

Q. What were those silver and lead contents?

A. The material had to contain 19 ounces of silver, 5.5% wet lead and 40% zinc. For any variation below that basis they were penalized, and if it exceeded that basis they received additional credits at the rate of 40 cents an ounce for silver, 20 cents a unit for the lead, and a dollar a unit for the zinc.

Q. Was there any limit for the unitage of zinc in that contract?

A. Not for the units of zinc, but there was a limit on the spelter quotation.

[fol. 807] Q. What was the limit on the spelter quotation?

A. Eight dollars for the spelter quotation; in other words, we paid for 50% of the zinc contents from \$5.50 to \$8.00 spelter quotation; that means if the ore contained 40 per cent. zinc we would pay \$4.00 per ton for each one cent per pound advance in the price of zinc above \$5.50, up to the maximum quotation of \$8.00.

Mr. Tibbetts: Above \$5.50 did you say?

A. \$4.00 per ton of ore; in other words, that would mean \$10.00 was the maximum that we would add to \$23.00 when spelter was \$8.00 or more, for 40% zinc containing the amount of silver and lead mentioned.

Q. Did you buy any considerable tonnage under those prices?

A. I do not recollect just what the tonnage was, but the memorandum I had made at that time was 100 tons a month.

Q. Have you any other instance in mind?

A. On March 10, 1915, we made a one-year contract with The Pingry Mines and Ore Reduction Company of Leadville for 750 tons of concentrates per month, for which we paid \$10.00 a ton for 33 per cent. zinc, .05 oz. gold, 7 oz. silver and 10% wet lead, \$5.00 spelter basis.

Q. Seven ounces in silver?

A. Seven ounces silver per ton and 10% wet lead, debits and credits for the variations the same as the one I have just mentioned.

Q. What was the limit on the spelter price?

A. The spelter price limit was \$8.00 and 50 per cent. of the zinc assay, above \$5.00 to \$8.00 maximum quotation.

[fol. 808] Q. How long did you purchase under that contract?

A. This arrangement was canceled on January 28, 1916. The variation for zinc in this contract, however, was only eighty cents a unit above 33 per cent., so that on the 40 per cent. zinc they received \$5.60 more for the zinc contents.

Q. Have you any other instance?

A. In August, 1915, we had an open arrangement with The W. J. Chamberlain Ore Smelting Company, public samplers, who operate in Clear Creek and Gilpin counties, Colorado, by which we paid them \$16.50 f. o. b. Denver for an ore containing 40 per cent zinc, .05 oz. gold, 10 oz. of silver and 6.5% wet lead, when spelter was \$5.00 St. Louis. The maximum that we paid them as the result of spelter advancing was \$16.00. That made the maximum spelter quotation approximately \$9.67 St. Louis.

Q. Have you any other instance?

A. Here is a contract with The Amalgamated-Pioche property of Nevada for a period of two years from July 1, 1915, with our option to extend it for another year, etc. This price was \$16.00 f. o. b. Blende—that is near Pueblo—for 40 per cent. zinc, .10 oz. gold and 10 ounces of silver, with practically the same variation for the metals as previous contracts mentioned.

Q. Based on what spelter price?

A. Five-dollar spelter. The maximum spelter quotation was \$8.00. We paid for 65 per cent. of the zinc contents from \$5.00 to \$6.00; 50 per cent. of the zinc contents from \$6.00 to \$7.00 quotation, and 30 per cent. of the zinc contents from \$7.00 to \$8.00 maximum quotation.

Q. Have you any other instance in mind upon which you base [fol. 809] your testimony?

A. Another contract with the Caldo Mining Company.

Q. Of what point?

A. They operated at Frisco, Utah.

Q. What was the basis of that contract?

Mr. Tibbetts: What was the date of it?

The Witness: September 4, 1915. This price was cancelled February 5, 1919. \$26.50 per ton f. o. b. Blende for 40 per cent. zinc, 20 ounces of silver per ton and 8 per cent. wet lead; variation, penalties and credits on all three metals. This was based on \$6.00 spelter quotation. The market variation was 70 per cent. of the zinc contents from \$6.00 to \$7.00, 50 per cent. from \$7.00 to \$8.00, 30 per cent. from \$8.00 to \$9.75, maximum St. Louis quotation.

Q. Have you any other instance in mind, Mr. Anderson?

A. Here is a contract with one of our own companies, subsidiary company.

Q. What was the name of that company?

A. The Federal M. & S. Company, Wallace, Idaho.

Q. What was the date of that contract?

A. June 30, 1915, and I might say this contract is still in effect. \$26.85 f. o. b. Blende for 45 per cent. zinc, 10 ounces of silver and 7 per cent. wet lead. Spelter is \$6.00 base.

Q. What was the spelter limit in that contract?

A. \$9.75. We paid 50 per cent. from \$6.00 to \$7.00—that is, 50 per cent. of the zinc assay, and only 30 per cent. from \$7.00 to \$9.75.

Q. In that contract just mentioned, what, if any, penalty existed in the event that the ores did not run 45 per cent?

A. One dollar per ton.

Q. One dollar per ton?

[fol. 810] A. One dollar a unit, and if the silver failed to hold up to 10 ounces, there was a penalty of 40 cents an ounce on every deficiency below 10 ounces, with a credit for every ounce above 10 ounces and also the penalty was 30 cents a unit for the wet lead below 7 per cent.

Q. You mentioned that this Federal Company was one of your subsidiary companies. Are any of the companies previously mentioned connected in any way with The United States Zinc Company?

A. No.

Q. Have you any other instance in mind?

A. We have another contract with the Green Hill and Cleveland Mining Co., Wallace, Idaho, of July, 1915, which was canceled July, 1916. I am not sure whether this is a contract; I think it is a contract, I am not sure, but the price is practically the same as our Federal price.

Q. What is the name of the company?

A. Green Hill and Cleveland.

Q. Having these specific instances in mind, and having now refreshed your recollection from each one of these contracts which you have consulted, what do you now say about the price for zinc ores quoted in the letter sheet, Exhibit 40?

Mr. Tibbetts: Same objection as to the previous question relating to the same subject.

A. I would say that the price in most cases was somewhat better than the schedules I have quoted.

Q. What prices were better?

A. Exhibit 40 is better.

Mr. Tibbetts: The same objection.

[fol. 811] Q. Now, Mr. Anderson, you may state whether or not, if the ores of The Mammoth Copper Mining Company had been offered to you between March, 1915 and February, 1916, you would have and could have quoted any better price than you find set forth in Exhibit 40?

A. I would say not. As a matter of fact, I find in February, 1915, that our San Francisco office submitted this Mammoth tonnage to me to purchase and I stated that on account of the small amount of silver and gold that we would not be interested in it and could not take it. As a matter of fact, it would not stand shipment on the schedules that I have mentioned. I might say that in July, 1915, we quoted a price to the Denver City Mine, Gunnison, Colorado, of \$30.00 per ton f. o. b. Sand Springs, Oklahoma, for 40 per cent. zinc, regardless of St. Louis spelter quotation. The Mammoth price would be \$36.00 for this same class of ore at that time.

Q. What do you mean by the Mammoth price?

A. Exhibit 40.

Q. The price disclosed in Exhibit 40?

A. Yes. In addition, September 20, 1915, there was a price quoted to a party in Sandon, British Columbia, of \$40.00 per ton for 50 per cent zinc, regardless of St. Louis spelter quotation. The average price of spelter in September at St. Louis was approximately 14 cents.

Cross-examination by Mr. Tibbetts:

Q. You spoke of one of these ores not interesting you because of the low silver and gold content. Was your company particularly interested in the gold and silver that could be obtained from the [fol. 812] ores?

A. Yes. We practically did not handle any ores that did not have gold and silver those times.

Q. That did not have a substantial percentage of gold and silver you mean?

A. That did not have a substantial percentage of gold and silver—that is, did not have enough to pay for the treatment at a lead smelter at that time, of the residues.

Q. In other words, this ore which you bought, concerning which you have testified, was bought for a lead smelter?

A. No, it was bought with a view of delivering the residues to lead smelters. The zinc was for our own company.

Q. And your company had a lead smelter, did it?

A. Yes, that is, the affiliated company. We are a subsidiary of The American Smelting and Refining Company; The United States Zinc Company is a subsidiary of The American Smelting and Refining Company.

Q. And this lead smelter was conveniently situated with reference to the other smelter?

A. Yes, sir; at Pueblo. One is at what is called Blende, three or four miles away.

Q. But both the zinc and lead smelters at which this ore was treated or would be used were situated within three or four miles of each other; at or near Pueblo, Colorado; is that correct?

A. Yes, sir. Exhibit 40, as I understand it, provides for the residues to be returned to the shipper, whereas in our case we bought them outright.

Q. Do you recall what price spelter was in March, 1915?

A. I have here a clipping taken from a trade journal.

Q. Well, I mean, have you any independent recollection of it?

A. No, I haven't.

Q. Or of the spelter quotations?

A. Just a moment. What date was that, please?

[fol. 813] Q. I said March, 1915. I am asking you about your recollection, independent of any memorandum which you may have?

A. No.

Q. And the same would be true, would it, of the months following March?

A. Yes; I have no personal recollection. I could not say what the price of spelter was five years ago.

Q. Have you any independent recollection of what the current prices of zinc ore were during the period from March to July, 1915, without reference to memorandum or records?

A. Excepting so far as my own company is concerned. I have a recollection of the conditions as they existed at that time in the zinc ore situation.

Q. You have an independent recollection apart from your record

memorandum, have you, as to prices paid by your company for zinc ore during that period?

A. These memoranda I have read from practically cover all of our receipts at that time. There was very little ore, outside of these tonnages that I have mentioned here, that we were receiving at that time.

Q. My question, Mr. Anderson, referred to your own recollection of the prices, apart from the figures on those various sheets.

A. I did not say that I had any recollection outside of this memorandum.

Q. How many zinc smelters did your company operate during the period from March to July, 1915?

A. I am not really sure whether we operated one or two. During 1915 we took over the Sand Springs plant, but just what time I am not sure. I think, though, it was about March.

Q. What was the capacity of each of those smelters?

A. Blende, 3,000 tons.

[fol. 814] Q. Per month?

A. Three thousand tons per month, and I could not say what it was at Sand Springs at that time, because we enlarged the plant considerably after purchasing it.

Q. Could you say approximately what its capacity was?

A. To the best of my recollection, probably 3,000 tons at that time.

Q. Did you have any long-term contracts for the Pueblo smelter that were in force during this period, which had been made sometime previously?

A. We had a couple of them; they were not very large tonnages.

Q. Do you remember approximately what the tonnage was?

A. No. To the best of my recollection, I would say that 500 tons would cover our contracts at that time.

Q. Five hundred tons per month?

A. Five hundred tons per month.

Q. Did you have any arrangement, which perhaps was not a contract, under which you received ores regularly; an arrangement entered into prior to those contracts you have mentioned?

A. No binding arrangement.

Q. Well, any arrangement under which you had an opinion to take ores?

A. I have no recollection of any. There were only a few tonnages that were under contract, on which we were obliged to pay current prices for spelter; that is, to follow the market all the way up.

Q. What I mean is, did you have contracts or arrangements under which, at your option, you could take ore during this period, apart from those you have mentioned?

A. I would say not.

Q. As to the first contract with The Daly-West Company, what sort of ore did that cover?

[fol. 815] A. Sulphide concentrates, I believe I gave you the grade of it.

Q. I mean in general the character of the ore. Sulphide concentrates?

A. Sulphide concentrates.

Q. And is the same true of the contract or arrangement with the Chamberlain Sampling Company?

A. Yes, more or less, only they had the option to ship any kind of material, crude ore or concentrates; either one. They were public samplers.

Q. How about the Amalgamated Company contract?

A. That was principally concentrates also.

Q. The Caldo Mining Company, was that concentrates?

A. That was a concentrate.

Q. And the Federal, also?

A. Yes, sir.

Q. And the Green Hill?

A. Yes, sir, and the Pingry.

Q. In other words, they all applied to concentrates?

A. Practically all. As a matter of fact, we make no distinction between crude ore and concentrates in the purchase.

Q. Would the quantity of the ore contracted for have any effect upon the price offered?

A. Well, it might.

Q. In other words, with reference to a smelter of a given capacity, you would pay less for a large quantity of ore which might exceed the smelter capacity, than you would for a quantity which you could conveniently handle; is that true?

A. Well, I would not want to say that. In the first place, we would not purchase more ore than the smelter capacity—If I understand your question correctly.

Q. And if your plant were supplied almost or entirely up to its capacity, you would not be in the market for any more ore; is that true?

A. Correct. That is the present situation to-day.

[fol. 816] Q. In other words, ore which ran beyond your capacity to handle at your own smelter would not be of any practical value, or not of sufficient value, to warrant you bidding for it in the open market?

A. We would not buy it on a high spelter quotation.

Q. Do any of those contracts refer to the silica in the ore?

A. No. We make no silica penalty in our contracts. Lime is the only element that we cover, and practically all of these carry lime limits, with penalties over. When I stated that these ores mentioned were practically our entire receipts, I had reference to sulphides only. At that time we were receiving considerable tonnages of oxidized ores, which, of course, are entirely a different class of material from the one under discussion.

Q. You were also interested, were you, in the course of the purchases which you made for your company, in getting ore with a substantial lead content?

A. Yes, we handled that class of ore, as indicated by these schedules.

Redirect examination by Mr. Nye:

Q. Mr. Anderson, calling your attention to the fact that 1915 was the year immediately following the outbreak of the war in Europe, have you any independent recollection at this time as to the condition of the zinc market in that year, as to whether it was stable or fluctuating?

A. Fluctuating.

Q. Have you now an independent recollection of that?

A. Yes.

Q. Just describe briefly the condition of the market?

A. I cannot recall the quotations as they were at that time, but [fol. 817] it was a very critical condition in the purchase of ore. We did not consider it safe to follow the market all the way up.

Q. Was the market moving in more than one direction?

A. Well, during that year it did; during the year quite violently.

Q. Did it move both up and down?

A. Yes.

Q. What did that create in the market; a condition of what, certainty or uncertainty?

A. A condition of uncertainty.

Q. In that year did you, as a buyer, or your company as a buyer of zinc ores and concentrates differentiate between concentrate carrying given quantities of zinc and other metals, and crude ores carrying the same or approximately the same quantities of zinc and other metals?

A. No, we did not.

Q. Was there any distinction or difference made, within your knowledge, by other ore purchasers between concentrates and crude ores?

Mr. Tibbetts: I object to the form of the question.

A. I could not say as to that.

Q. You do not remember any such?

A. I do not remember any, no.

Q. Was the company of which you were the ore buyer, The United States Zinc Company, accustomed to purchase in the year 1915 beyond its capacity to handle and smelt zinc ores?

A. No; certainly not.

Q. At any price?

A. No.

Q. In your experience with The United States Zinc Company have you ever purchased ores beyond the capacity of your smelters to [fol. 818] handle, and by reason of such purchase being beyond the capacity of your smelters, bid for and obtained them at the lesser price than you were paying for ores within your capacity to handle?

A. I would say not.

Q. You have now no independent recollection of any such occurrence?

A. No. There were times when our shippers gave us more ore

than we required, but the condition was rectified just as soon as possible thereafter.

Q. Did that fact change the price?

A. No; I would not say so.

Q. Most of your purchases were under definite contracts, were they not?

A. Most of them were under contract at that time.

Recross-examination by Mr. Tibbetts:

Q. Did you say that in the instances where the shippers gave you more than you wanted, there was no difference in price?

A. In general, I would say no. I would say that we simply had them stop shipping; reduce their shipments.

Q. Can you now say in what direction the market fluctuated, say in April, 1915?

A. Not from memory; no.

Q. On in May or June, 1915?

A. I have no recollection at this time just what the individual fluctuations were as to any particular month.

Q. Or during the period say from March to July, 1915?

A. My recollection is that it fluctuated both ways; up and down.

Q. Have you a clear recollection of that?

A. As clear as it is possible to have. I would not wish to say definitely, but that is the best of my recollection, that the market [fol. 819] fluctuated considerably, both up and down, during that period.

Q. And when you speak of the "market," you mean the zinc ore market?

A. I mean the St. Louis spelter market—the zinc or spelter market; they are both synonymous, they are both the same; I use them indiscriminately; they both mean the same to me.

Q. Is there any distinction between the spelter market and the ore market?

A. Except the ores are purchased on the basis of the spelter market. As the spelter varies, the price varies that the shipper receives.

Q. So if the St. Louis price of spelter varied appreciably during a given period, it would mean that the price of crude ore would vary also?

A. Yes, sir.

Q. And vary in the same direction?

A. Yes—that is, except the spelter quotation was higher than the limit set by our prices, then there was no variation in the price.

Q. But in general, if you would enter into a contract, the spelter price at the period would largely influence the ore price, would it not?

A. Yes.

Redirect examination by Mr. Nye:

Q. State whether or not these several contracts which you have referred to as contracts existing between your company and various

other companies in 1915 contained provisions allowing for or taking into consideration a variation in the spelter price?

A. Yes, they did.

Q. What is the fact in respect to whether that is usually taken [fol. 820] into consideration in such contracts for the purchase of zinc ores or concentrates?

Mr. Tibbetts: Same objection.

Q. State whether or not the variation in spelter price usually forms an element in contracts for the purchase of zinc ores.

Mr. Tibbetts: The same objections as I made to the question as to particular prices herein given.

A. Nearly always.

[fols. 821-823] DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTARY'S CERTIFICATE—Omitted in printing

[fol. 824] DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION RE TESTIMONY OF GEORGE BLOW

It is hereby stipulated that the deposition de bene esse of the witness George Blow, who resides at Knoxville, State of Tennessee, more than 100 miles from the place where the trial of this action will occur, may be taken on behalf of the plaintiff in the above-entitled action, before Harry F. Byrne, a Notary Public for Kings County, State of New York, whose certificate is filed in New York County, State of New York, commencing on the 11th day of June, 1920, and continuing thereafter from day to day, Sundays and holi-[fol. 825] days excepted, until completed, between the hours of 10 o'clock A. M. and 5 o'clock P. M. on each of said days, on the 24th floor of No. 37 Wall Street in the Borough of Manhattan, City and County of New York; that said deposition may be taken down in shorthand and thereafter transcribed and when so transcribed shall be signed by the witness, and may then be used on the trial of the said action by either party, subject to all objections to questions other than as to the form of the question and subject to all objections as to any exhibit offered, and subject to the right of either party to move

to strike out any answer or any exhibit on any ground except as to the form of the question upon which the answer is predicated.

Dated, New York, June 11, 1920.

Charles W. Stockton, Attorney for Plaintiff, By K. E. Stockton. Francis G. Caffey, United States Attorney for the Southern District of New York, Attorney for Defendants Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, By Harland B. Tibbetts.

[fol. 826] DISTRICT COURT OF THE UNITED STATES IN AND FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

GEORGE BLOW, of Knoxville, State of Tennessee, a witness called on behalf of the plaintiff herein, pursuant to the foregoing stipulation, on the 11th day of June, 1920, being duly cautioned and sworn to testify the whole truth and being carefully examined, deposes and says as follows:

[fol. 827] Appearances: Charles W. Stockton, Attorney for plaintiff, by K. E. Stockton; Francis G. Caffey, United States Attorney for the Southern District of New York, attorney for defendants Garvan and Burke, by William Travers Jerome and Harland B. Tibbetts.

Direct examination by Mr. Stockton:

Q. What is your name and residence, Mr. Blow?

A. George Blow, Knoxville, Tennessee.

Q. What was your occupation in the year, 1915?

A. Mining engineer and general manager of the Southern Minerals Company, Knoxville, Tenn.

Q. Were you connected with any other companies?

A. Not at that particular time.

Q. Were you ever connected with the Union Zinc Co.?

A. That company was organized subsequently and I was Vice-President from its organization.

Q. Are you a graduate of any technical school?

A. Columbia School of Mines, 1909.

Q. After graduating from school will you state what company you allied yourself with?

A. The Standard Slate Corporation, 43 Exchange Place, New York City.

Q. How long were you with them, Mr. Blow?

A. 2 years.

Q. In what capacity?

A. First as manager and later as general manager.

Q. As general manager did you have anything to do with the sales of the product?

A. As general manager—there was a sales manager but the sales [fol. 828] were directly under him though I had supervision of them.

Q. How long were you with the Standard Slate Co.?

A. 2 years.

Q. After that what did you do?

A. I was employed by a syndicate in New York to investigate the zinc resources of Virginia and Tennessee.

Q. How long were you employed in that capacity?

A. About 3 months.

Q. Then after that?

A. I located in Knoxville and engaged in mining engineering and mining operations.

Q. With what company?

A. With the Southern Minerals Company first.

Q. In what capacity?

A. As general manager.

Q. And you remained with Southern Minerals Company up through 1915?

A. Yes.

Q. Had you ever had any experience in mining prior to going to college?

A. I was born on a mine, my father being a mining engineer. I have been in touch with mining with the exception of one year, in one way or another, ever since I can remember.

Q. In connection with your position with the Southern Minerals Company did you have anything to do with the mining or smelting or production of zinc?

A. I had direct charge of the development operations and also of the selling of the output.

Q. Did the Southern Minerals Company have a zinc mine at that time?

A. They were developing a mine known as a new prospect mine, in Union County, Tennessee.

Q. Was that the mine that was subsequently owned by the Union Zinc Company?

A. It was subsequently taken over by Union Zinc Company and operated by them.

[fol. 829] In the beginning of 1915?

A. It was later than the beginning of 1915.

Q. Sometime during 1915?

A. Sometime during 1915.

Q. What was the product of that mine?

A. Sulphide and carbonate ores, primarily zinc carrying some lead.

Q. How high did the zinc percentage run?

A. From 30 to 50% zinc.

Q. When did you first start development of that mine?

A. In the early part of 1915.

Q. Did you make any efforts to market the product of the mine?

A. On May 18th or 19th, 1915, we sent inquiries to a number of smelters, I should say 12 or 15, asking for bids on various classes of ores.

Before we go any further, Mr. Blow, will you state whether or not there is any general exchange or any general market for crude zinc ore?

A. Not that I know of, I have never been able to find it.

Q. How is the price of crude zinc ore determinable?

A. It depends largely on the conditions existing at individual plants, as to whether or not they are in a position to accept ore.

Q. Is there any general quotation giving ranges of price—any paper quotation giving the ranges of prices of crude zinc ore, that you know of?

A. Not that I know of.

Q. In order to sell your crude zinc ore can you market it in any one locality, or do you have to do it just by soliciting bids from everybody that is in the business that you think would take it?

A. It's a matter of personal inquiry with the individual smelters.

Q. Now; you say you sent out a letter in May 1915, did you [foi. 830] give the date?

A. May 18th or 19th.

Q. Trying to dispose of your product? Will you give us the general terms of that letter?

A. It was an inquiry for offers on 3 classes of ore, designated as No. 1, No. 2 and No. 3; No. 1 of which was 40% zinc, 2% lead and 2% iron, No. 2 was 40% zinc, 25% lead and 2% iron, No. 3 was 35 to 45% zinc, 3% lead and 1% iron. The letter was a general inquiry for prices on the above classes.

Q. Do you remember receiving any responses to this inquiry?

A. I received no firm offers.

Q. Do you remember whether you did receive any responses?

A. Yes, we received several letters in reply, to the effect that they were not in the market for such a product.

Q. Did these letters give any reason for their not being in the market?

A. No specific reason, no, other than that their requirements were filled at the present time, but no other reason beyond that.

Q. Do you remember when you first produced any appreciable quantity of ore from that mine? Approximately, not exactly, if you can give us the month, as close as you can recollect.

A. In the spring or summer of 1915 there was a small quantity produced.

Q. About how much, do you remember. Mr. Blow?

A. I should say possibly two or three carloads.

Q. Did you make any further effort to market this product?

A. You mean subsequent to this first effort.

Q. Yes, subsequent to the letter of May?

A. On August 25, 1915, we sent out another series of letters or inquiries on ore similar to No. 1, that is, 40% zinc, 2% lead and 2% iron.

[fol. 831] Q. You did not in this letter of August 25, send out any letters concerning any other product except the 40% zinc, 2% lead and 2% iron?

A. That only was specified in that letter.

Q. Have you a copy of that letter with you, that is, the general form of the letter?

A. Several.

Q. Could you produce one or two? I might state that these letters are only produced for the information of the court, and not for any particular evidentiary purpose, but just to show the terms upon which he solicited offers?

A. There are 6 of them here.

Q. If you will detach them. Those are copies of the letters you sent out, Mr. Blow?

A. Yes.

Offered in evidence as Plaintiff Exhibit 75A—

Mr. Jerome: These are all alike are they?

Witness: Very much the same, the tenor is all the same.

Q. Did you receive any replies to these letters, Mr. Blow?

A. Yes, several replies.

Q. Did these replies contain any offers for the purchase of your zinc?

A. At that point here, may I be permitted to refer to some of those letters there?

(Witness examines letters.)

There were no firm offers in these replies, though there were several—I won't say several, I would say there were one or two, basis of prices being paid at that time, quoted in replies.

[fol. 832] Q. Will you pick out the letters the basis of prices are quoted?

A. Letter from the Bertha Mineral Co., dated September 8, 1915.

Q. I offer this letter in evidence, Plaintiff's Exhibit 76A.

Q. Any others?

A. There were no others at that time giving a firm offer, quoting any prices.

Mr. Jerome: All objections are reserved, aren't they, except as to the form of the question?

Mr. Stockton: Yes.

Q. You testify you received that letter in response to your letter of inquiry?

A. I do.

Q. Did you receive any other letters in response to your letter of August 25?

A. There were a number of them to the same effect, that the smelters were unable to handle sulphide ores, the general tenor of them being that their requirements were filled and they were unable to accept shipment.

Q. Will you pick out those letters? (The witness selects certain letters.) I offer these letters in evidence as Plaintiff's Exhibit 76, B C and D. Have you here any letters received by you in response to your inquiry of May 19, or 18?

A. I believe there are a number here.

Q. Will you pick them out? (The witness selects certain letters.) Were those letters received by you in reply to your inquiry?

A. They were.

Mr. Tibbetts: What date, May 18 or 19?

Witness: May 18.

Mr. Stockton: I offer them in evidence as Plaintiff's Exhibit 77 A to F.

[fol. 833] Q. Have you gone through your files carefully, with a view to ascertaining whether you had any other letters in response to your inquiry of May 18 or 19?

A. I have.

Q. Have you found any other letters?

A. I have been unable to locate any that had any bearing.

Q. And you cannot remember receiving any that aren't in your files?

A. I don't recall any at all.

Q. Now, about the inquiry of August 25, have you gone through your files to find out whether you have any other letters in response to that inquiry?

A. I have.

Q. Are there any others?

A. Not that I know of.

Q. And you don't recollect receiving any which weren't in your files?

A. No.

Q. Did you, during the time from the spring of 1915, on, make any other efforts than by letter to dispose of your zinc product?

A. With some of the officers of the American Zinc Co. of Tennessee, friends in Knoxville and I talked it over with them in regard to disposing of some of our product and to get a further line on the market at that time, and I made some efforts to dispose of this same ore through them.

Q. Were they able to obtain any offers?

A. I got one offer from Mr. Rosman of American Zinc Co. of Tennessee, or American Zinc, Lead & Smelting Co., for one carload in December.

Q. Did you ship that ore?

A. We had two carloads which we tried to dispose of and we were able to ship only one of them.

Q. How long had you been trying to dispose of those two carloads?

A. The two carloads; possibly from August.

Q. What terms did you receive for the carload which you actually [fol. 834] shipped to the American Zinc, Lead & Smelting Co?

A. It was on a basis of \$1 a unit, 40% zinc, limits of 3% lime, 1½% lead and 2% iron, with penalties of \$1 for every unit exceeding these limits, f. o. b. Hillsboro.

Q. F. o. b. Hillsboro?

A. Yes.

Q. Mr. Blow, will you compute upon those terms what the returns would have been upon a zinc product running 40% zinc and about 8% iron?

A. \$34.

Q. Per ton?

A. Per ton.

Q. Would those terms have been f. o. b. Hillsboro?

A. As quoted; yes.

Q. Do you know what the freight was at that time from Hillsboro to the plant of the American Smelting?

A. I am not certain, but as I recall it, it was in the neighborhood of \$3.85 to \$4.

Q. A ton?

A. Yes.

Q. That would leave a net price at the plant of \$30.15 a ton, wouldn't it?

A. If those freight rates are correct.

Q. When did you make that shipment of ore, do you remember, Mr. Blow?

A. It was sometime in December. The quotation was made on December 1, 1915.

Q. Did you at any time during the summer or fall of 1915 receive any other letters with reference to inquiries made by you for the disposal of your zinc product?

A. On November 1 we sent out similar letters to those which we sent out on August 25, and received replies to those very much in the same tenor, although these letters stated a definite price which we wanted for the ore.

Q. Did you send out inquiries to the Robert Lanyon Zinc & Acid Co.?

A. On November 1.

[fol. 835] Q. Did you receive an answer from them?

A. I did.

Q. Is that the answer? (Showing letter to witness.)

A. It is.

Q. Will you tell me what the figures at the bottom of that letter indicate, if you know?

A. A calculation of the price of ore referred to in the letter above, which states that the Robert Lanyon Co. just unloaded a car of ore from Wisconsin assaying "47.7% zinc for which we pay \$39.40 per ton plus \$2 per ton freight." This calculation at the bottom shows what 40% ore would bring, using a differential or a variation of \$2 per unit. That's a calculation of the price of 40% ore f. o. b. Hillsboro, using the above figures as a basis.

Q. What does it indicate would be the price f. o. b. Hillsboro on their terms?

A. As shown here they make it \$26 per ton.

Mr. Stockton: I offer it in evidence as Plaintiff's Exhibit 78.

Q. Did you from time to time send out other inquiries to various individual plants requesting quotations on your product?

A. Do you mean subsequent to this letter?

Q. At various other times. You didn't send out a whole batch of letters, did you; you sent out individual letters?

A. They were usually made on a given form and sent to a series of smelters at the same time.

Q. Have you any replies to such other letters sent out asking for quotations?

A. I don't understand you, you mean subsequent——

Q. In addition to the letters of May 19 and August 25 and No-
[fol. 836] vember 1, that you have already shown, did you send out any other letters to which you received replies?

A. There were some further replies to those of November 1.

Q. I show you a letter dated August 18, 1915, from the Grasselli Chemical Co., and ask you if that letter was received by you

A. It was.

Q. Does it reply to any letter which you wrote them?

A. It is in reply to a letter of ours of August 13.

Q. What did that letter of August 13 contain, generally speaking?

A. I cannot say definitely, but it is an inquiry regarding the shipment of some ores.

Q. Inquiring regarding the shipment of zinc sulphide ores?

A. Yes, zinc sulphide ores.

Mr. Stockton: I offer it in evidence as Plaintiff's Exhibit 79A.

Q. I also show you a letter from the Bertha Mineral Co. dated September 20, 1915, addressed to Southern Minerals Co. and ask you if you received that letter?

A. We did.

Q. Was it written in reply to a letter sent by you to Bertha Mineral Co.?

A. In answer to a letter of ours of September 17.

Q. Is that a copy of your letter of September 17 (showing witness letter)? I might state that the letter of September 17 is not introduced for evidenciary purpose but is merely for the information of the court largely as to the terms and meaning of the letter written in response thereto.

Mr. Stockton: I offer it in evidence as Plaintiff's Exhibit 79B and C.

[fol. 837] Q. Will you state whether or not you had written any letter prior to your letter of September 17, to the Bertha Mineral Co., containing the general terms of your inquiry for quotations?

A. On September 10—I have a copy of a letter which was written to Bertha Mineral Co. giving analyses of several grades of ore.

Q. Is that a copy of that letter (shows witness letter)?

A. Yes, that's a copy.

Mr. Stockton: I offer it in evidence as Plaintiff's Exhibit 79-D solely for the purpose of explaining the terms of the offer of the letter to which the letter of the Bertha Mineral Co., Plaintiff's Exhibit 79B, is a response.

Q. I show you letter dated February 19 from the Granby Mining Co. to Southern Minerals Co. and ask you if you received that letter?

A. Yes, we did.

Q. Is it a reply to any letter of yours?

A. It's a reply to a letter of ours of February 17, 1916.

Q. Do you remember the general purport of your letter of February 17?

A. It was an inquiry as to price on sulphide ores.

Q. Sulphide ores of the same general character as the ones you previously described, that is, 40% zinc, 2% lead and 2% iron?

A. Yes.

(Offered in evidence as Plaintiff's Exhibit 79E.)

Q. I also show you a letter dated November 3, 1915, from the Granby Mining & Smelting Co. to Southern Minerals Co., and ask [fol. 838] you if you received that letter?

A. I did.

Q. Is that written in response to a letter from you offered in evidence as Exhibit 79F?

A. It is in reply to a letter of November 1.

Q. What was the general purpose of your letter of November 1?

A. It was inquiring for a price on 50 tons of zinc sulphide ore, 40% zinc, 2% lead, 2% iron.

Mr. Stockton: I offer that in evidence as Plaintiff's Exhibit 79F.

Q. Were you able during any part of 1915 to obtain an offer for the disposal of the product of your mine running 40% zinc, 2% lead and 2% iron, on more favorable terms than those given you by the American Zinc, Lead & Smelting Co.?

A. No, we were not.

Q. Were you able to dispose of the other carload of ore?

A. Not until sometime later.

Q. At any time during 1915?

A. No.

Cross-examination by Mr. Jerome:

Q. Mr. Blow, I notice in one of these letters offered in evidence here, in reply apparently to some offer from a concern which you were connected with, a statement that the value of these ores—zinc ores—depended a good deal upon the mineral content. One smelter would be willing to pay for ore of a certain character what another

smelter would not, because having other ores it could mix in with it. That is correct, isn't it, in regard to the zinc ores generally?

A. I don't understand the exact question.

[fol. 839] Q. I call your attention to a letter placed in evidence by the plaintiff, Exhibit 79B, from Bertha Mineral Co., dated September 20, 1915, in which occurs the following:

"In regard to discussion of prices for ores of various kinds and grades the prices offered in every case are based not only upon general market conditions, but also upon the needs of the specific smelter, and it therefore often happens that one smelter can afford to pay more than another for a given ore at a given market. At present we might use your carbonate ore had you any to sell, and also your grade C ore, but your grade A and B ores would not attract us."

There is there, that statement of fact? Do you concur in the opinion there expressed?

A. I do.

Q. So that in your opinion the ores from any particular mine, because of variations in mineral content, might be more or less attractive to different smelters?

A. It might be more attractive to one smelter than it would to another.

Mr. Stockton: Do you know from your own personal knowledge?

Witness: Depending upon the character of the ores. Some smelters are able to handle them to better advantage than others.

Q. Your experience is that those that can handle it to better advantage will pay more for it than those who can't?

A. Yes, for instance No. 2, which is specified in one of these letters, was a lead zinc ore which was very hard to dispose of; the [fol. 840] other was a straight sulphide blend ore; and also in those letters some of those concerns state that they can handle carbonate ores but that the market on the sulphide ores was choked.

Q. As I understand it, there is no open market for crude zinc ores where you get from time to time established quotations?

A. I don't know of any established quotations on the ore.

Q. And it's a matter of shopping around to find a purchaser whose needs are such that he requires that particular quality of ore?

A. Not necessarily that particular quality of ore.

Q. Well, if you had 1,000 tons of crude zinc ore at your mine you would have to shop around to find a person that wanted that 1,000 tons of ore and was willing to pay the highest price for it?

A. Depending upon the condition of the market at that time.

Q. There would be nothing that you could refer to for a fixed price for that ore you would have to see what different persons were giving for it?

A. I would want to see for my own benefit.

Q. You would have to, wouldn't you?

A. I don't know anything that you could sell on the same basis.

Q. Yes, you could sell zinc—established quotation for zinc, market for zinc—just as there is for cotton, etc.

A. A fluctuating market, yes. But I mean to say, the point that you make is, as I understand it, that there is a fixed price for zinc ore or fixed price for spelter.

Q. No, I don't mean that there is a fixed price, but I am trying to draw a distinction between an open market where there's always a sale at some price and there are quotations such as there are in [fol. 841] the metal market for silver, for lead and for zinc, as there is in the commodity market for cotton and coffee and sugar. There is nothing analogous to that in regard to crude zinc ores?

A. Not that I know of.

Q. You couldn't take up your Mining & Engineering Journal at the end of the week and find market quotations for crude zinc ores as you could for spelter or other metals?

A. No.

Q. Your ores were crude ores, not concentrates?

A. At that time they were crude ores.

George Blow.

Subscribed and sworn to before me this 11th day of June, 1920. Harry F. Byrne, Notary Public, Kings Co. No. 90.
(Seal.) Kings Reg. 1245, N. Y. Co. 665, N. Y. Reg. 1627.

[fol. 842]

PLAINTIFF'S EXHIBIT 2

Dept. B. E/CF.

Sept. 16th, 1914.

Mr. Herbert Salinger,
Salt Lake City, Utah.

DEAR SIR:

Mammoth Contract

This is to confirm our yesterday's telegram reading as follows:

"You are authorized sign contract Mammoth in accordance with our letter Sept. 9th. Will send letter conforming."

authorizing you to sign in our behalf contract entered into with Mammoth Copper Company for their output of Crude Zinc Ores covering period of one year.

Yours very truly, Beer, Sondheimer & Co. A. B.

[fol. 843]

PLAINTIFF'S EXHIBIT 3

Western Union

Salt Lake City, Utah

Co New York, N. Y., Aug. 26, 1914.

Mr. Herbert Salinger,
1101 New House Bldg., Salt Lake Ut.:

Kennett accept for one year send contract for approval.

Beer, Sondheimer and Co. 9.14 A. M. 395.

PLAINTIFF'S EXHIBIT 4

Western Union

Night Letter

Salt Lake City, Utah

New York, Feb. 23, 1915.

W. H. Eardley,
Care United States Smelting Co.,
New House Bldg., Salt Lake, Ut.:

Can you arrange for me that for Kennett ore variation for spelter above six one half cents be only three dollars I think this is only [fol. 844] fair under present extraordinary conditions which were never anticipated you no doubt can explain situation to Medcalf and I really think something ought to be done to meet smelter in fair and equitable way condiering that ore can not be smelted for quite some time and that zinc futures so uncertain and almost unsaleable you know yourself what big chances for loss there are try and fix this for me regards.

Herbert Salinger. 4.13 A. M.

324.

PLAINTIFF'S EXHIBIT 5

Western Union

Salt Lake City, Utah, Feb. 24, 1915.

Herbert Salinger,
c/o Beer, Sondheimer & Co.,
61 Broadway, New York, N. Y.:

Regret cannot make any change Kennett contract.

W. H. Eardley. Chg. U. S. Smelting Co.

[fol. 845]

PLAINTIFF'S EXHIBIT 6

Herbert Salinger
Special Representative Beer, Sondheimer & Co.
New York City
1101 Newhouse Building
Salt Lake City

January 20, 1915.

Mr. G. W. Metcalf,
c/o Mammoth Copper Mining Co.,
Kennett, Calif.

DEAR SIR:

With the spelter market again reaching high level, it should be a great incentive for your company to ship as much as possible. Will you kindly let me know what you figure your February production to be? Thanking you in advance for this information, I am,

Yours very truly, (Signed) Herbert Salinger. HS/OB.

[fol. 846]

PLAINTIFF'S EXHIBIT 7

Mammoth Copper Mining Company of Maine

January 27th, 1915.

Mr. Herbert Salinger,
1101 Newhouse Building,
Salt Lake City, Utah.

DEAR SIR:

Answering your inquiry of Jan. 20th, would say that we are at present building a new zinc sorting plant which should be in shape for operation the latter part of February. It is, however, unlikely that it will be operating soon enough to make any material increase in our February production. Our March production will be considerably increased.

Yours very truly, (Sgd.) G. W. Metcalf, Manager.

[fol. 847]

PLAINTIFF'S EXHIBIT 8

B., S. & CO., N. Y.

September 9/14.

Mr. Herbert Salinger,
Salt Lake City, Utah.

DEAR SIR:

Mammoth Copper Mining Company

We beg to hand you enclosed the contracts which were sent to us by U. S. Smelting Company for execution. With reference to our exchange of telegrams we noted that the clause in regard to re-shipment of residues has to be eliminated; furthermore, we have as you will see on the first page stricken out "and concentrates" as we have not bought the concentrates, and our negotiations only referred to shipping crude ore. We cannot agree to take concentrates under the terms of this contract, as the character of the concentrates might be entirely different from what the crude ore is, and we certainly have to know what the fineness, etc., will be. We understand that these people are not making any concentrates yet, and probably will not make any for quite some time to come, so that it will be time enough to take this matter up when these people know what they are actually going to do. We therefore hand you enclosed this contract with the above mentioned two changes and we authorize you to accept same with the above named exceptions.

We still doubt, as expressed to you before, that there is anybody [fol. 848] in the United States that can afford to pay such price for the copper contents, but since we have once agreed to it we do not want to raise any further objection, although we think that the price paid is entirely too high. We feel that prices for ore will be very much cheaper in the near future, as undoubtedly a great deal of foreign ores are going to be imported.

Yours very truly, Beer, Sondheimer & Co., A. B.

[fol. 849]

PLAINTIFF'S EXHIBIT 9

Statement of Freight Rates

From Kennett, Cal., to Altoona and Iola, Kans. and Bartlesville, Okla., July 3, 1915 to Oct. 30, 1915.

Zinc Ore Values

\$20.00	30.00	40.00	50.00	60.00	70.00	80.00	90.00	100.00
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Per ton of 2,000 lbs.

Item 1.....	\$9.75	10.25	11.00	14.00	17.00	17.00	17.00	17.00	17.00
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From Kennett, Cal., to Altoona and Iola, Kans. and Bartlesville, Okla., Oct. 30, 1915 to Feb. 26, 1916.

Per ton of 2,000 lbs.

Item 2.....	9.75	10.25	11.00	11.75	12.50	13.25	14.00	14.75	15.50
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From Bartlesville, Okla., to Altoona, Kans., Oct. 23, 1915 to Nov. 19, 1915.

Cents per 100 lbs.

Item 3.....	6%	6%	6%	6%	6%	6%	6%	6%	6%
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Zinc Residues from Altoona and Iola, Kansas, to Leadville, Colo., October 5, 1915 to December 23, 1915

Per ton of 2,000 lbs.

Item 4.....	4.25	4.50	4.50	4.50	4.50	4.50	4.50	4.50	4.50
To Pueblo, Colo...	2.25	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50
Pueblo to Leadville, Colo..	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00
Through.....	4.25	4.50	4.50	4.50	4.50	4.50	4.50	4.50	4.50

From Altoona and Iola, Kansas, to Chrome, N. J., Aug. 23, 1915 to Oct. 3, 1915.

\$20.00	30.00	40.00	50.00	60.00	70.00	80.00	90.00	100.00
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Per ton of 2,000 lbs.

Item 5.....	5.70	5.70	5.70	5.70	5.70	5.70	5.70	5.70	5.70
To E. St. Louis, Ill.	2.30	2.30	2.30	2.30	2.30	2.30	2.30	2.30	2.30
E. St. Louis-Chrome	3.40	3.40	3.40	3.40	3.40	3.40	3.40	3.40	3.40
Through.....	3.70	5.70	5.70	5.70	5.70	5.70	5.70	5.70	5.70

For Tariff Reference see page 2.

[fol. 850]

PLAINTIFF'S EXHIBIT 10

Tariff Reference

Item 1

Rates for \$20.00, \$30.00 and \$40.00 values effective January 8, 1915, Item 1631, Page 229, Supplement 23, Trans-Continental Tariff

3-K, I. C. C. 978, to January 24, 1916. Same rates continued. Item 944-C, Page 55, Supplement 3, to Trans-Continental 3-L, I. C. C. 1018, to April 25, 1916.

Rates for values \$50.00 to \$100.00, inclusive, effective January 8, 1915 to October 30, 1915, Items 615 and 620, Page 121, Trans-Continental Tariff 3-K, I. C. C. 978.

Item 2

Rates for \$20.00, \$30.00 and \$40.00 values, same item and tariff reference as Item 1.

Rates for values \$50.00 to \$100.00, inclusive, effective October 30, 1915, Item 1631-B, Page 784, Supplement 52, Trans-Continental Tariff 3-K, I. C. C. 978 to January 4, 1916. Same rates continued to April 25, 1916, Item 944-C, Page 55, Supplement 3 to Trans-Continental Tariff 3-L, I. C. C. 1018.

Item 3

Effective October 1, 1915, Item 60, M. K. & T. Tariff 6064, I. C. C. A-4130 to April 29, 1916.

Item 4

To Pueblo:

Effective March 1, 1915, Item 2516, Page 84, Trans-Missouri [fol. 851] Tariff 11-J, I. C. C. 316 to January 1, 1916, Item 2516-B, Supplement 25 to Trans-Missouri Tariff 11-J, I. C. C. 316.

Pueblo to Leadville:

Effective August 4, 1909, Item 17, page 5, D. & R. G. Tariff 4632-A, I. C. C. 2145. Agreed valuation not to exceed \$5.00 per ton to July 5, 1918, Item 17-A, Page 3, Supplement 13, same tariff.

Item 5

To East St. Louis:

Effective May 22, 1915, Page 8, Index 15, Missouri Pacific Tariff 1189-D, I. C. C. A-2781, same rates continued effective October 1, 1915, Item 255, Page 10, Column 5, Western Trunk Line Tariff 87, I. C. C. A-615.

East St. Louis to Chrome, N. J.:

Effective May 15, 1915, Item 1397-B, Page 7, Supplement 81, Agent William Cameron's Tariff 300-B, I. C. C. D-66, rate continued to June 1, 1916, Item 1397-C, Page 20, Supplement 110, Agent William Cameron's Tariff 300-B, I. C. C. D-66.

[fol. 852]

PLAINTIFF'S EXHIBIT 31

Plaintiff's Tabulation Showing Ore Shipped under Contract to Beer,
Sondheimer & Co. Received and Paid for by Them.

Lot number	Date shipped	Dry weight, pounds	Net amount received
7	Nov. 28, 1914.....	105,942	\$696.67
8	do.	102,060	696.68
9	do.	99,560	685.66
10	Nov. 30, 1914.....	82,691	590.45
11	do.	83,222	465.58
12	Dec. 15, 1914.....	85,636	370.28
13	Dec. 25, 1914.....	79,262	440.59
14	Jan. 7, 1915.....	92,356	836.36
15	Jan. 16, 1915.....	112,640	1,166.05
16	Jan. 25, 1915.....	90,448	928.52
17	Feb. 1, 1915.....	109,120	1,336.45
18	Feb. 6, 1915.....	101,234	1,273.65
19	Feb. 13, 1915.....	108,610	1,226.45
20	do.	108,962	1,517.69
21	Feb. 16, 1915.....	110,314	1,481.82
22	Feb. 17, 1915.....	104,010	1,080.18
23	Feb. 19, 1915.....	106,280	1,443.45
24	Feb. 23, 1915.....	108,714	1,496.20
25	Feb. 23, 1915.....	111,220	1,525.58
26	Feb. 26, 1915.....	111,077	1,497.28
27	March 1, 1915.....	110,499	1,549.03
28	March 6, 1915.....	110,525	1,191.48
29	do.	113,952	1,103.74
30	March 7, 1915.....	110,460	1,016.73
31	March 8, 1915.....	108,325	898.64
32	do.	109,519	1,161.96
33	March 9, 1915.....	109,537	1,301.90
34	March 11, 1915.....	110,587	1,447.96

[fol. 853] Add adjustments: 2 2,897,763 \$30,427.03

Lots 18, 22, 24, 28 and 31..... 1,448.681 1,182.17
 Lot 27..... 166.08
 " 18..... 33.66

Total received under contract..... \$31,808.94

PLAINTIFF'S EXHIBIT 50

United States Smelting Company

Geo. W. Heintz, General Manager Ore Purchasing Department
Salt Lake City, Utah

August 29, 1914.

Mr. B. Elkan,
Beer, Sondheimer & Co.,
61 Broadway, New York.

DEAR SIR:

We enclose you herewith copies of proposed contract between the Mammoth Copper Mining Company and Beer, Sondheimer & Company. We wrote Mr. Metcalf a few days ago relative to making a contract on his behalf with your company but have not yet received authority from him to do so. We are, however, sending you this contract and kindly request that after looking it over you advise us if same is satisfactory and in the meantime we will undoubtedly have heard from Mr. Metcalfe relative to its execution. Upon receipt of such advice we will wire you and you can then attach your sig. [fol. 854] nature and forward extra copy and retain the other copy for your files.

Yours very truly, United States Smelting Company, By —
— WHE:LA. Encl.

PLAINTIFF'S EXHIBIT 51

Western Union

Salt Lake City, Utah

150 CHHR 30 Blue LI.

Co. New York, N. Y., Sept. 4, 1914.

W. H. Eardley,
The U. S. Smelting Co.,
Newhouse Bldg., Salt Lake, Ut.:

Referring your letter August twenty-ninth regarding Mammoth Copper Mining Company clause reshipment of residues page six not agreed upon and not acceptable to us otherwise seems to be satisfactory.

Beer, Sondheimer and Co. 11.44 A. M.

[fol. 855]

PLAINTIFF'S EXHIBIT 52

Know all men by these presents:

That for and in consideration of the sum of Ten Dollars (\$10) Gold Coin of the United States to Mammoth Copper Mining Company of Maine, a corporation, the first party, paid by F. Y. Robertson of Pelham Manor, State of New York, the second party, and in consideration of other valuable consideration to the first party moving from the second party, receipt of all of which is hereby acknowledged by the first party, the first party has assigned, transferred and set over, and does hereby assign, transfer and set over unto the second party, his heirs and assigns, each and every claim and demand and cause of action of whatsoever kind or nature, which the first party may have against Beer, Sondheimer & Company, a copartnership, and Beer, Sondheimer & Company, Inc., a corporation organized and existing under the laws of the State of New York, or either of them, under and by virtue or arising out of a certain contract dated August 26, 1914, and made between the first party and the said Beer, Sondheimer & Company.

In witness whereof, on this 27th day of September, 1916, the first party has hereunto caused its corporate name to be signed and its corporate seal to be affixed, by its Vice-President and Secretary, thereunto duly authorized.

Mammoth Copper Mining Company of Maine, by Frederic R. Lyon, Vice-President. By F. W. Batchelder, Secretary.
(Seal.)

Approved as to form. (Sgd.) Alfred Sutro, Attorney. Sept. 21, 1916.

[fol. 856]

PLAINTIFF'S EXHIBIT 53

Western Union

New York, March 17/1915.

Mammoth Copper Mining Company,
Kennett, California:

Are advised you shipped from March sixth to ninth fifty tons zinc ore daily whilst your average shipments since beginning contract amounted to only about two hundred tons monthly. In view of abnormal conditions we will only accept tonnages reasonably equal to the average monthly amount shipped heretofore. We are unable to receive and smelt any further tonnage in accordance page five of our contract with you. We have advised all other shippers accordingly.

Beer, Sondheimer & Co.

PLAINTIFF'S EXHIBIT 54

Western Union

Co. New York, N. Y., 10.24 A. M. 3/23.

Mammoth Copper Mining Co.,
Kennett, Calif.

Understand so far eight hundred tons have arrived Bartlesville. Repeat we are unable to accept such tonnages and request you to act accordingly.

Beer, Sondheimer & Co.

[fol. 857]

PLAINTIFF'S EXHIBIT 55

Western Union

Received at SF FC 16 paid.

Co. New York, 11.39 a. m. Mar. 24.

Mammoth Copper Co.,
Kennett:

Referring our yesterday's telegram received further two billadings cannot accept what shall we do with bladings.

Beer, Sondheimer & Co.

PLAINTIFF'S EXHIBIT 56

Postal Telegraph—Cable Company

Beer, Sondheimer & Co.,
61 Broadway,
New York City:

Salt Lake City, May 14, 1915.

Mammoth Copper Mining Company will resume shipments of zinc ore to National Zinc, Bartlesville, at rate of four hundred tons monthly commencing Monday next.

United States Smelting Co.

[fol. 858]

PLAINTIFF'S EXHIBIT 57

Western Union

Salt Lake City, Utah.

B. P. New York, N. Y., 2.14 p. m. 15.

United States Smelting Co.,
Salt Lake, Utah:

Mammoth Copper telegram Fourteenth received. What does Mammoth Co. propose to do with cars now at Bartlesville? We have

conscientiously endeavored make reasonable arrangements without success and will not now make any arrangements regarding further ore unless satisfactory and complete adjustment is made.

Beer, Sondheimer and Co.

[fol. 859]

PLAINTIFF'S EXHIBIT 58

Mammoth Copper Mining Company of Maine
Kennett, California

May 15th, 1915.

Messrs. Beer, Sondheimer & Co.,
61 Broadway,
New York City, N. Y., and
1101 Newhouse Building,
Salt Lake City, Utah.

DEAR SIRs:

We have on hand 2,394 tons of zinc crude ore, running not less than 33 per cent. metallic zinc, over and above the tonnage received by you for the month of April, 1915, and which, under our contract with you, dated August 26th, 1914, we are ready to ship and deliver to you f. o. b. cars at your Smelting Works at Bartlesville, Oklahoma, or at such other Works as you may designate.

In your letter of April 6th, 1915, you notified us that you would not take more than a maximum of 400 tons per month of zinc crude ore. We are giving you this notice so that, if so advised, you may notify us of your willingness to accept the foregoing tonnage which we have on hand, and which, in the event of your failure to accept, we will sell for the best obtainable price, and will hold you responsible for whatever loss we may sustain by your refusal to accept the same.

Yours truly, Mammoth Copper Mining Company of Maine,
By G. W. Metcalfe, Manager.

[fol. 860]

PLAINTIFF'S EXHIBIT 59

Mammoth Copper Mining Company of Maine
Kennett, California

Messrs. Beer, Sondheimer & Co.,
61 Broadway,
New York City, N. Y., and
1101 Newhouse Building,
Salt Lake City, Utah.

June 16th, 1915.

DEAR SIRs:

We have on hand 3,914.93 tons of zinc crude ore, running not less than 33 per cent. metallic zinc, over and above the tonnage received

by you for the month of April, 1915, and which, under our contract with you, dated August 26th, 1914, we are ready to ship and deliver to you, f. o. b. cars at your Smelting Works at Bartlesville, Oklahoma, or at such other Works as you may designate.

In your letter of April 6th, 1915, you notified us that you would not take more than a maximum of 400 tons per month of zinc crude ore. We are giving you this notice so that, if so advised, you may notify us of your willingness to accept the foregoing tonnage which we have on hand, and which, in the event of your failure to accept, we will sell for the best obtainable price, and will hold you responsible for whatever loss we may sustain by your refusal to accept the same.

Yours truly, Mammoth Copper Mining Company of Maine,
By G. W. Metcalfe, Manager.

[fol. 861]

PLAINTIFF'S EXHIBIT 60

Mammoth Copper Mining Company of Maine
Kennett, California

July 12th, 1915.

Messrs. Beer, Sondheimer & Co.,
61 Broadway,
New York City, N. Y., and
1101 Newhouse Building,
Salt Lake City, Utah.

DEAR SIRs:

We have on hand 3,811 tons of zinc crude ore, running not less than 33 per cent. metallic zinc, over and above the tonnage received by you for the month of April, 1915, and which, under our contract with you, dated August 26th, 1914, we are ready to ship and deliver to you, f. o. b. cars at your Smelting Works at Bartlesville, Oklahoma, or at such other Works as you may designate.

In your letter of April 6th, 1915, you notified us that you would not take more than a maximum of 400 tons per month of zinc crude ore. We are giving you this notice so that, if so advised, you may notify us of your willingness to accept the foregoing tonnage which we have on hand, and which, in the event of your failure to accept, we will sell for the best obtainable price, and will hold you responsible for whatever loss we may sustain by your refusal to accept the same.

Yours truly, Mammoth Copper Mining Company of Maine,
By G. W. Metcalfe, Manager.

[fol. 862]

PLAINTIFF'S EXHIBIT 61

New York, N. Y., August 5, 1915.

Beer, Sondheimer & Co.,
61 Broadway, New York.

GENTLEMEN :

We have on hand approximately 5,000 tons zinc product running less than 33% zinc. We hereby offer to sell you same under the terms of our contract with you dated August 26, 1914.

Kindly advise us promptly if you elect to accept this product because if you do not elect to accept same we will dispose of it elsewhere.

Yours very truly, Mammoth Copper Mining Company of
Maine, Per G. W. M., Manager. GWM/AMS.

Copy to New York Office—Mr. Sharp, Mr. Heintz, Mr. Alfred Sutro, Mr. A. P. Anderson.

[fol. 863]

PLAINTIFF'S EXHIBIT 62

Alien Property Custodian Report

A Detailed Report by the Alien Property Custodian of all Proceedings had by Him under the Trading with the Enemy Act During the Calendar Year 1918 and to the Close of Business on February 15, 1919.

Washington

Government Printing Office

1919

The German Metal Triumvirate

There are but three great international metal concerns in Germany—the Metallgesellschaft of Frankfurt, Aron Hirsch & Sohn of Halberstadt, and Beer, Sondheimer & Co. of Frankfurt. These giant organizations, whose operations now circle the globe, are of comparatively recent development and are the growth of very small and humble beginnings.

Around the year 1800 there were in Germany three small concerns or individuals devoting themselves to the metal business, viz., Jacob Raviné, Berlin; Philip Abram Cohn, Frankfurt; Aron Hirsch, Halberstadt. They traded in the products of the country—lead produced in the Hartz Mountains or in Saxony or Silesia, copper produced by the Mansfield Works and other small concerns, and they also brought in some copper from Sweden.

In the nineteenth century the three concerns developed on some-
[fol. 864] what different lines: Raviné drifted more into the iron business; Cohn developed into a very large metal merchant, and

Hirsch developed into a combination of industrial manufacturer and metal merchant.

(1) The Metallgesellschaft is the largest of these concerns and is by far the most powerful metal concern in the world. It is a stock corporation with a capital of 18,000,000 marks. It is the outgrowth of the metal business founded by Philip Abram Cohn early in the nineteenth or late in the eighteenth century. In the early sixties of the last century, Henry Merton, whose real name was Moses and who was related to Philip Abram Cohn, founded a metal firm in London which later became the powerful house of Henry R. Merton & Co. (Ltd.). The Metallgesellschaft and the Merton firm worked hand in hand for the advancement of German domination of the metal markets of the world.

(2) Aron Hirsch & Sohn, a copartnership, is the business founded by Aron Hirsch and it has always been kept in the Hirsch family. This house has not confined itself strictly to metal trading but has also engaged in metal manufacturing. It has interests all over the world.

(3) Beer, Sondheimer & Co., a copartnership, was founded in the latter part of the seventies by Messrs. Beer and Sondheimer, two salesmen of Metallgesellschaft, who broke away from the Metallgesellschaft and with the assistance of the Mitteldeutsche Credit Bank started in business for themselves under the name of Beer, [fol. 865] Sondheimer & Co. This firm has confined its activities principally to the zinc smelting business.

The Federal Trade Commission in its Report on Cooperation in American Export Trade issued in 1916 has included a very excellent chart showing the interrelations between the German metal houses. This has been used as a basis for the charts hereto annexed which have been brought down to date according to the latest information available, and which show the ramifications of the German metal combine. We find in their control not only German metal and chemical companies, but also French, Belgian, English, Australian, American, Swiss, Austrian, Italian, Spanish, and Mexican. In addition they control syndicates for the exploration of mines in South America, Hungary, Russia, and on the African Continent. In this vast combine we find chartered 245 separate companies whose interests lie in almost every part of the globe and who produce every known form of mineral.

The Zinc Syndicates

At the outbreak of the European war the zinc industry of the whole world, save only the United States (as to which comment will be made separately), was completely in the control of the German metal triumvirate—the Metallgesellschaft, Aron Hirsch & Sohn, and Beer, Sondheimer & Co. The control of the purchase of ores, principally Australian ores, was exercised by means of joint accounts among the three German firms, while the control of the smelters and the zinc spelter which they produced was exercised in Germany by

[fol. 866] the German Zinc Syndicate, and in the other European countries by an International Zinc Syndicate. But Metallgesellschaft—and its English offshoot Henry R. Merton & Co. (Ltd.)—Aron Hirsch & Sohn, and Beer, Sondheimer & Co. were in absolute control of all of these syndicates.

(a) The Australian zinc ore purchasing combine.—When Australia, during the nineties of the last century came to the fore as a large metal-producing country, principally zinc ore, the German metal triumvirate—Metallgesellschaft, Aron Hirsch & Sohn, and Beer, Sondheimer & Co.—took hold of the situation and became the dominating influence in the purchase of the Australian zinc ores. This took the form not of a syndicate but of an arrangement for joint accounts, resulting in the elimination of nearly all competition both in the purchase of raw material and in the allocation of the ore among the smelters on the European Continent. It is interesting to note the development of this combine:

What are known as the Broken Hill properties in Australia were very prolific producers of zinc ore. The annual production was about 477,000 tons. The ore was refractory, and there was great difficulty in disposing of the huge production. England, apparently, was not in a position to handle the product, and a situation developed more or less similar to the situation which arose in the United States in the eighties when England, through her inability or unwillingness to treat the copper product coming from America led to the erection of large smelting and refining plants in the United States. The three German metal concerns immediately in [fol. 867] vaded the field and sought to find a market for this tremendous output. Each of them opened an agency of its own in Australia. Metallgesellschaft created for this purpose the Australian Metal Co. Aron Hirsch & Sohn formed a connection with Francis H. Snow of Adelaide. Beer, Sondheimer & Co. engaged the shipping firm of Elder Smith & Co., as their agents. At first these German concerns were in keen competition with one another in the Australian field, and there were also in the field several English firms, as well as the great Belgian zinc smelting concern, Societe Vielle Montagne. Competition was very keen and profits small. Production was increasing all the time. During the Boer war and the depression incidental to it the metal concerns suffered severely under their contracts with Australians and as a result of the losses which they suffered during that period they came to the conclusion that, being the largest buyers of products coming from Australia, a way should be found to eliminate the competition both in the purchase of raw material and its disposition to the various smelters on the European Continent. About the year 1902 joint accounts were arranged—first between the Metallgesellschaft and Aron Hirsch & Sohn in which later on Beer, Sondheimer & Co. were included and a working arrangement was reached with the Societe Vielle Montagne. These arrangements were nothing but loose joint account arrangements changeable and changed from time to time, but in effect they finally resulted in a dominating influence as far as the purchase of zinc ore was concerned, which continued to be

471

exercised by the German metal triumvirate until the outbreak of the European war.

[fol. 868] Having acquired what amounted to practically a monopoly of zinc ore, the German metal triumvirate next sought to obtain control of the smelters where the ore was treated and of the zinc spelter, which is the finished product. And here they sought not only to control the output of the metal but also to fix the prices. They established zinc smelters in Germany, Belgium, France, Russia, Poland, and Austria, and they even acquired interests in British zinc smelters. Aron Hirsch & Sohn, for instance, practically owned a zinc smelter at Swansea Vale, England. They succeeded completely in Germany, where they established the German Zinc Syndicate, which controlled the output of zinc in Germany and fixed the prices therefor. They also succeeded in establishing an international zinc syndicate, but through that they regulated only the output outside of Germany and not the prices.

(b) The German Zinc Syndicate (Zinkhüttenverband).—This was organized in 1909 with a capital of 2,000,000 marks. The organizers were the same old triumvirate, the Metallgesellschaft, Aron Hirsch & Sohn, and Beer, Sondheimer & Co. All the large zinc concerns of Germany entered the syndicate, with the single exception of the firm of Giesche's Erben; but even this concern agreed to sell only at prices fixed by the syndicate. The triumvirate were appointed the exclusive selling agents of the syndicate and through a subsidiary of the syndicate, the Kölner Zinkhüttenverband, the syndicate regulated the prices of zinc in Germany. The syndicate is said to be absolute in its control of the German zinc output and [fol. 869] in price fixing. Through the German Zinc Syndicate the Germans have controlled one-half of the zinc output of Europe and about one-third of the world's output.

* * * * *

(c) Beer, Sondheimer & Co. (Inc.).—Beer, Sondheimer & Co. of Frankfurt, established a New York branch in 1906. Like the Metallgesellschaft, it sent over two young men, Benno Elkan and Otto Frohnknecht, who established the business here under the name of Beer, Sondheimer & Co., American Agency. The name was subsequently changed to Beer, Sondheimer & Co., American Branch, and the business was conducted under that name until August, 1915, when it was incorporated, under circumstances which will be hereinafter discussed. The New York business was owned at all times by the Frankfurt house, Elkan and Frohnknecht being only agents upon a salary and a profit-sharing basis.

Like the parent company, Beer, Sondheimer & Co., American Branch, confined its activities mainly to dealing in zinc. It made contracts with various zinc ore producers for their entire output, and in 1907 acquired a controlling interest in the National Zinc Co., which owned a zinc smelter at Bartlesville, Okla., and had under lease another zinc smelter in Springfield, Ill., and an acid plant in Argentine, Kans. In 1908, Beer, Sondheimer & Co. obtained con-

trol of the old El Cobre Copper Mine in Santiago, Cuba. It organized a corporation known as Cuba Copper Leasing Co. to operate the mine in Cuba. In 1908, Beer, Sondheimer & Co. took a long lease of a copper smelter in West Norfolk, Va., and organized a [fol. 870] corporation known as the Norfolk Smelting Co., through which it has been operating the copper smelter. The product of the El Cobre mine and such other copper ore as Beer, Sondheimer & Co. purchased was treated in the Norfolk plant.

In recent years Beer, Sondheimer & Co. has also become interested in the development of zinc mines in the Butte district. It has taken options on various mining claims in that district and has done considerable prospecting therein. The following tables show copper, spelter, and lead turnover of Beer, Sondheimer & Co. for several years:

List of Contracts for Zinc Ore

Name of seller	Commodity covered by contract	Tonnage delivered during—				
		1914	1915	1916	1917	1918
Federal Mining and Smelting Co., Wallace, Idaho.	Total output of zinc concentrates for 3 years from date first shipment.	4,799	.....	.....	.....	.....
Silverton Mines (Ltd.), Silverton, B. C.	Total output of zinc concentrates for 3 years from July 1, 1914.	2,203	.....	.....	.....	.....
Elm Orlu Mining Co., Butte, Mont.	Total output of zinc concentrates for 5 years, 6 months, extended to Mar. 31, 1920, for 3,000 tons monthly.	19,270	46,577	51,584	34,157	43,123
Standard Silver Lead Mining Co., Spokane, Wash.	Total output of zinc concentrates to Nov. 11, 1914 delivered.	4,440	.....	.....	.....	.....
Pingrey Mines, Leadville, Colo.	Total output of zinc concentrates to January, 1915.	570	.....	.....	.....	.....
Maxwell W. Atwater, Basin, Mont.	Total output of zinc concentrates amounting to about 8,000 to 10,000 tons.	1,997	2,021	4,180	.....	.....
Rambler Cariboo Mining Co. (Ltd.), Spokane, Wash.	Total output for 1 year.....	1,715	.....	.....	.....	.....

American Metal Co. (Ltd.), New York.	50,000 tons clinkered residues from Clarksburg.	.....	7,761	6,564	9,693	9,974
Standard Silver Lead Mining Co., Spokane, Wash.	Accumulation of zinc concentrates to the end of 1915 and production from 1916 to 1920.	.....	2,837	8,656	5,384	4,305
Western Metals Co., Salt Lake City.	Output of zinc carbonates from Seranton mines to Dec. 31, 1917.	1,100	.....	.....	.....	.....
John F. Milliken St. Louis (Afterthought Copper Co.).	Output of zinc concentrates for 5 years.	.....	.....	.....	.....	1,801
Rambler Cariboo Mining Co. (Ltd.), Spokane, Wash.	Output of zinc concentrates for 1 year.	.....	.....	.....	.....	311

[fol. 871]

List of Contracts for Copper Ore and Copper Concentrates

Name of seller	Date of contract	Commodity covered by contract	Tonnage delivered during—			
			1914	1915	1916	1917 1918
British Columbia Copper Co., New York.	Mar. 24, 1911	36,000,000 pounds blister copper.	2,932	475	2,470	127
American Metal Co. (Ltd.), of New York.	Feb. 5, 1914	18,000 tons Lebanon cin-der.	5,756	4,807	3,830	2,333
American Smelting & Refining Co. New York.	Apr. 6, 1914	4,800 long tons of Elect. Cu. from May, 1914 to Apr., 1915.	1,125	.....	.....	.....

List of Contracts for Copper Ore—Continued

Name of seller	Date of contract	Commodity covered by contract	Tonnage delivered during—				
			1914	1915	1916	1917	1918
Bingham New Haven Copper Gold Mining Co., New Haven.	Jan. 22, 1913	Copper and lead resulting from ores shipped to International Smelting & Refining Co.: Copper Lead	721 3,619	750 3,164	1,618 1,764	..........	..........
United Metal Selling Co., New York.	Mar. 24, 1914	1,500 gross tons Elect. Copper, delivery May-October, 1914.	1,000	.....	.....	.....	.....
Quincy Mining Co., New York.	June 12, 1914	75 tons monthly of lake copper with 6 months notice of cancellation.	285	.....	.....	.....	.....
Cuba Copper Co., New York-Santiago.	June 2, 1914	Total output of copper concentrates and crude ore from the El Cobre mines: Concentrates Crude ore	19,892 3,066	17,552 8,081	22,370 6,722	26,957 2,038	21,100 1,811
Manuel Luciano Diaz, Habana, through C. L. Constant Co.	July 8, 1914	9,000 tons low-grade copper ore.	1,760	7,380	.....	.....	.....

Do	do	9,000 tons high-grade copper ore.	6,319	3,066	.....	.....
Virginia Smelting Co., Jan. Boston, Mass.	8, 1916	Copper ore from Blanton Copper mining Syndicate, San Domingo, for 2 years.	.....	.....	233	.....
Eustis Mining Co., Apr. Boston.	4, 1912	Lump cinder and fine cinder from Eustis pyrites.	2,120	1,720	.....	.....
Do	15, 1912	Lump cinder.....	2,552	2,965	.....	.....
Do	12, 1914	Fine cinder and lump cinder produced by Eustis Mining Co.	16,800	20,000	20,600	18,000

Total Turnover

Spelter dealt in:		Pounds	Value
1915	.....	73,143,943	\$8,118,004.00
1916	.....	75,563,802	10,342,882.00
1197	.....	57,459,556	5,330,090.00
1918	.....	49,814,465	4,131,826.00
Total		255,981,766	27,922,802.00
Lead dealt in:			
1915	.....	6,210,758	278,716.00
1916	.....	5,754,419	378,096.00
1917	.....	6,230,411	527,232.00
1918	.....	673,727	70,539.00
Total		18,869,315	1,254,583.00
Copper dealt in:			
1915	.....	17,071,632	2,559,490.00
1916	.....	24,295,095	5,530,191.00
1917	.....	27,056,933	7,326,273.00
1918	.....	10,450,315	2,627,004.00
Total		78,873,975	18,052,958.00

[fol. 872]

Mineral-Separation Agency

The history of Beer, Sondheimer & Co.'s activities in the United States would not be complete without mentioning its connection with the various mineral-separation companies.

What Mineral Separation Means—The Patents

The various minerals-separation companies have successively claimed to own patents covering an improved process of ore concentration. Ore concentration in metallurgical operations is the separation of the mineral or metallic part of the ore from the nonmetallic or worthless material found associated with it in nature, in order that the valuable metallic particles may be in proper condition for the subsequent process of smelting. Hence the name "mineral separation."

Expressed in language which laymen can understand, this new process may be described as the addition of a very small quantity of oil described as the addition of a very small quantity of oil to the ore pulp (which is ore finely pulverized floating on water) followed by vigorous agitation of the pulp, and the introduction of air currents into the mixture resulting in the development and distribution throughout the mixture of small bubbles of air which attach

to themselves the valuable metallic particles and with them rise to the surface forming a mineral froth of such coherency as to afford full opportunity for its removal from the surface for further treatment of the metallic particles while the worthless material sinks to the bottom.

Prior to the invention of this new process, ore concentration, or the separation of the mineral from the useless parts in ore, was effected by the water or gravity process. In that process the ore was mixed with water forming the ore pulp; the pulp was shaken, thereby separating the metallic particles from the worthless parts of the ore, and the metallic particles being heavier than the water, sank to the bottom, while the worthless particles being lighter than the metallic particles, though heavier than the water, were subjected to an up current of water which carried the worthless particles to the surface and over the container. The old process was commercially unsuccessful because it permitted a large percentage of the metal in the ore to be carried off with the worthless particles. The material thus rejected was called slime. For years dumps consisting of millions of tons of such slime, which were known to contain a large percentage of metal, lay useless because there was no known process by which they could be treated and the metal extracted.

In 1906 (Henry Livingstone Sulman, Hugh Fitzalis, Kirkpatrick Picard, and John Ballot, all of London, England, claiming to be the inventors of the new process, obtained a patent thereon in the United States. In 1910, Sulman and Henry Howard Greenway and Arthur Howard Higgins, all of London, obtained another patent in the United States, and in 1914, Greenway, then of Melbourne, Australia, obtained a third patent in the United States, the latter two patents involving the same process as the first one, but including improvements thereon. These patents run for a period of 17 years from their respective dates.

In 1905, and before the first United States patent was obtained, the patentees obtained a patent in England exactly similar to the first United States patent. The validity of the English patent was [fol. 874] attacked in the English courts, but was sustained by the House of Lords. (*Mineral Separation (Ltd.) v. British Ore Concentration Syndicate (Ltd.)*, 27 R. P. C., 33.)

In 1903, Minerals Separation (Ltd.), which will be hereafter designated as the parent company, was formed under the English law. The three United States patents were assigned to this company.

In 1910, the patent company having acquired the United States patents, and similar patents obtained in Canada and Mexico, conveyed these patents to a corporation called Minerals Separation American Syndicate (Ltd.), for the purpose of enabling the American syndicate to exploit these patents in America. This, too, was an English corporation.

In 1911 the American syndicate made a contract with Beer, Sondheimer & Co., whereby it gave to that firm the exclusive agency to represent the syndicate in America. For reasons which are unimportant to the present inquiry, this first American syndicate was soon

dissolved and a new syndicate was formed, called Minerals Separation American Syndicate (1913) (Ltd.). This, too, was a British company. The 1913 syndicate renewed the agency agreement of Beer, Sondheimer & Co., and appointed that firm sole agents to conduct all of the syndicate's commercial affairs in the United States, Canada, and Mexico, the agency to continue for a minimum period of 10 years with a provision for renewal for the rest of the life of the patents. Beer, Sondheimer & Co. were to — dicare intending not only to give licenses, but also royalties received for the use of the patents and 10 per cent on all profit-sharing business (the syndi- [fol. 875] cate intending not only to give licenses, but also to buy up and treat ores), and also a percentage as a commission of the sale of products so treated by the syndicate.

When the agency agreement was made Beer, Sondheimer & Co. had an American branch of its business in New York City, which was in charge of Bonno Elkan and Otto Frohnknecht and was being conducted under the name of Beer, Sondheimer & Co., American branch. The parties entered into the performance of the agreement, and inasmuch as most if not all of the business was done in the United States the agent's end of the business was conducted by the American branch of Beer, Sondheimer & Co.

In addition to having exclusive agency, Beer, Sondheimer & Co. were also stockholders of the 1913 syndicate, owning 32,615 shares of said stock. In 1916 the property of the 1913 syndicate was conveyed to an American corporation called Minerals Separation North American Corporation, and each stockholder became entitled to two shares of the American corporation's stock for each share of the 1913 syndicate stock.

The importance of the control by this German-owned branch of Beer, Sondheimer & Co. of the minerals-separation process, and the power to grant or withhold from the United States metal-industry licenses to use the flotation process, can hardly be overestimated. The Custodian, as will be pointed out later, has taken over all of the minerals-separation stock held by Beer, Sondheimer & Co., and the latter's control of the minerals-separation process in the United States has broken.

[fol. 876] Who will say that these three powerful German-owned or German-controlled companies were not a standing menace to the security of our domestic metal industry as well as to the development of our own commercial interests in Mexico and South America? It is no answer to the obvious potential power for evil which these companies possessed to point to the fact that since the European War the American Metal Co. has been entirely officered by Americans who have shaped the policy of that powerful organization, or to show that Vogelstein is a naturalized American citizen, or to remind us that Elkan and Frohnknecht, in control of Beer, Sondheimer & Co., are likewise American citizens—they were late converts to citizenship. The power lay in the hands of Hirsch & Sohn and Beer, Sondheimer & Co. and the Metallgesellschaft and its step-child, Henry R. Merton & Co., at any time and all times to direct the policy of these American concerns. These outposts of German

commercial aggression having gained a foothold in the United States, were gradually spreading into Mexico and South America, which are legitimate fields for our own commercial development. In Mexico to-day the American Metal Co. is second only to the American Smelting & Refining Co. in its control of the mineral wealth of that country. In Peru and Chile and in other parts of South America these companies not only control the output of mines and smelters, but the American Metal Co. also owns mining claims of great extent. With unlimited resources at their command, they bought up mines, financed and built smelters and refineries, bought and sold huge quantities of metals, organized and controlled their own transportation facilities, and even invaded the oil industry. With the control-[fol. 877] ling power of these great organizations centered in the hands of the Germans—knowing what we now know about Germany and Germans—who will deny that they have been a menace to the country?

We are not alone in our fear of German commercial aggression, nor in our desire to eradicate the German influences. England has gone even further than we have. Finding that the Germans had practically complete control of the Australian metal output, the English courts have declared void as against public policy all contracts between the Germans and the Australian mines, and the English have now completely supplanted the Germans in the control of Australia's metal industry. In the meantime in 1918, England passed an act for the purpose of controlling the nonferrous metal industry and required that all persons engaged therein should first obtain a license from the board of trade. Henry R. Merton & Co. were refused such license, and in consequence thereof that company, together with its subsidiary, the Merton Metallurgical Co., Ltd., have gone into liquidation.

France and Belgium are rebuilding their smelters and building new ones. And it may safely be assumed that German ownership in the French and Belgian smelters and refineries will never be restored to them. Thus cut off from their control of the Australian zinc ores and from the control of Belgian and French smelters, their world domination of zinc and lead has been irreparably shattered.

This brings us to a consideration of what effect our participation in the war has had upon the German-controlled American companies, and how we have endeavored to deal with them.

[fol. 878]

The Outbreak of the War

When the European war broke out these three American branches of the German metal triumvirate found themselves cut off from their German principals. Germany was in great need of metals, especially copper, and at first the American Metal Co. (Ltd.), Vogelstein and Beer, Sondheimer & Co., as well as other large American selling agencies, sought to supply that need by making shipments to neutral countries, but destined for Germany. The British blockade, however, soon tightened and after some consignments were

seized by the British, an agreement was entered into between the six principal American selling concerns—Vogelstein & Co. and American Metal Co., included—and the British Admiralty whereby the American Copper selling agencies agreed not to ship any copper to any country except those allied with England, without special permission from the British authorities. It is believed that after that agreement had been entered into, it was scrupulously observed by the American Metal Co. and Vogelstein & Co. The year 1916 was a very profitable year for all three of these German metal concerns. The American Metal Co. made a profit of \$7,000,000 during 1916. Vogelstein & Co. showed a profit of \$3,000,000 and Beer, Sondheimer & Co. showed a profit of \$2,000,000.

Disclosures by Investigations Conducted by Alien Property Custodian

After the passage of the Trading with the Enemy Act in October, 1917, and the subsequent appointment of the Alien Property Custodian, he caused investigations to be made of the American Metal Co., Vogelstein & Co., and Beer, Sondheimer & Co., as a result of which he took over the entire business of Vogelstein & Co. and of Beer, Sondheimer & Co. and 49 per cent of the stock of the American Metal Co. The investigations disclosed the following state of facts:

As to Beer, Sondheimer & Co.—In August, 1915, Benno Elkan and Otto Frohnknecht, who, as pointed out above, were simply the agents of the Frankfort firm of Beer, Sondheimer & Co. and were conducting, in the United States, a branch of the business of the Frankfort firm under the name of Beer, Sondheimer & Co., American Branch, without the knowledge or consent and against the express wish of the Frankfort firm formed a corporation under the laws of the State of New York called Beer, Sondheimer & Co. (Inc.), capitalized at \$1,000,000, and transferred to that corporation all of the assets of the Frankfort firm in consideration of the issue to that firm of all the capital stock of the new corporation. Correspondence passing between the Frankfort firm and the American attorneys who advised Elkan and Frohnknecht in this situation and did the legal work in organizing the corporation, clearly shows that the corporation was organized and the assets were transferred to it for the express and only purpose of making it impossible for the United States Government, in case of a war between the United States and Germany, to exercise its belligerent rights and take control of enemy property in the United States. One of these American lawyers, writing to Beer, Sondheimer & Co., of Frankfort, after the corporation had been organized and the [fol. 880] assets transferred, explains the purpose of the organization as follows:

September 15, 1915.

GENTLEMEN:

I thought it in line with my duty to you, both in my professional capacity and as an interested friend, that I should write you relative to the recent incorporation of the American branch.

Having discussed a similar proposition with you during my recent visit, and knowing your mind upon the subject, I naturally counseled Messrs. Elkan and Frohnknecht to consider the matter with extreme care before any decisive step was taken. Shortly after my arrival the situation here looked very grave, and the diplomatic complications were a source of apprehension to me. From the various opinions that I was able to secure, it was quite clear that the situation was very serious. Having these facts in mind, and also knowing that you were not inclined to favor the incorporation, Mr. Elkan believed that we should take counsel.

The firm of . Y.,* which is, as you already know, one of our best firms here (being the same firm that rendered an opinion on the question of * * * §), was employed by Mr. Elkan. This firm of X. Y., after mature consideration, both as to law and the known facts of the diplomatic situation, advised without reservation, that it was necessary to incorporate; in these views I fully concurred.

[fol. 881] The means of communicating with you were so meagre and the necessity of keeping the facts from our enemies so evident, that we were compelled to act with extreme caution. We sent you as many messages as possible, under the circumstances; but we received no answer to the cables and wireless messages sent you on the subject, yet we delayed taking action until we believed it was hazardous to wait longer, therefore we acted upon our best judgment.

As far as the incorporation is concerned, personally I looked upon it as the only practical means of protecting your interests here, so that your business could be carried on in spite of any difficulties that might arise between the Governments. The idea was executed with the sole and only purpose of guarding your interests, there being no other consideration present in the working out of the idea. Further than this, the whole matter under our laws here is at present in such position, that at any time, either now or after the conclusion of peace, the corporation can be dissolved and the entire business can be put back under the name of the American branch just as it was before the incorporation. In other words, your interests are the same now as they were before except as to form, but the legal status of the property here has been changed. The whole question is one for you to determine, whether you desire to have the business continue under the present company or not.

I might suggest for your guidance that for the present, and until the war is over, that the incorporation stand as it is, because it not only makes a difference in the conduct of the business as a matter of law, but as you must realize, it makes a decided difference [fol. 882] in the opinion of Americans. There is no denying the fact that the great preponderance of American sympathy is with the allies, and this phase of the question you must bear in mind in considering the advisability of taking any immediate step to dissolve the corporation.

I also want you to know that in taking the step there was abso-

*The use of Initials is ours.

§The omission is ours.

lutely nothing that was done that was not thoroughly discussed and agreed upon by Messrs. Elkan and Frohnknecht, Falck, and we attorneys. The company is so organized that it is impossible at this time, or at any other time, except with your consent, that any separation of interests could be made. In other words, the whole business is absolutely in your control.

The matter of the indebtedness of the branch to you, although it is not expressed in any way in the incorporation papers, has, nevertheless, been taken care of satisfactorily. The accountings for interest upon the indebtedness and the various other details in connection therewith have been and will be carried on so that there can be no question arising as to these matters. The only difference will be that of form.

The statement in X. Y.'s opinion which reads "We prepared to meet your desire to secure to the corporation at least for a period of substantially three years the same personal management and direction which has been enjoyed by your American branch," needs a little explanation. Usually voting trust agreements are made for this purpose and under ordinary circumstances that reason is given for the execution of such voting trust agreements. The real reason in this incorporation for executing the agreement and the transfer [fol. 883] of the stock to voting trustees was for the sole purpose of putting the stock in such legal form that in case any action was taken by the Government here that your interests could not in any way be legally jeopardized—that the business should go on without interruption. In other words, there is and was no intention of perpetuating anybody in the management or direction of the American branch.

I have gone into these matters in detail because I realize that it is difficult for you at so great a distance, and with your known objection to corporate form, to understand the reason underlying such a move. I can give you my personal assurances that the incorporation is the only solution open to us at the present time, and although we may disagree as to the conditions and as to the seriousness of the situation, nevertheless, in my judgment the step was not only wise and proper, but absolutely necessary. I should have deemed it a breach of duty to you to have subjected all of your assets in this country to the dangers that were apparent, and this fact alone was of sufficient weight to determine my agreement with the opinion of X. Y. Without trying in any way to seek justification for the action taken, as I do not deem that necessary, I think it will be all too apparent to you that the consummation of the proposition was but an honest fulfillment of a duty to you to protect your property, and in the last analysis the facts must be judged on this basis. The only misgivings that I have had were that we could not advise with you more fully before completing the work, but as I have already said, this was impossible in the nature of things, nevertheless such communications as were possible to send were sent.

To sum up the whole matter, I would say that we have given

[fol. 884] you an insurance policy upon your assets here, and like all insurance policies, this one is subject to cancellation.

I hope that all of my good friends are in good health and that peace will soon be concluded so that we may all return to the normal business relations.

With my kindest and best respects and wish to you all, I am

Very sincerely yours, (Signed)

The assets thus transferred to the corporation amounted to about \$3,250,000, which did not include the profits made by the business in 1915, amounting to about \$1,200,000, and the profits of 1916, amounting to \$2,000,000. Between September, 1915, and February 3, 1917, Beer, Sondheimer & Co., of New York, transferred to Beer, Sondheimer & Co., of Frankfort, \$2,047,000. The last remittance of \$700,000 was made on February 3, 1917, the very day on which Count Von Bernstoff received his passports and was sent out of the country. When this happened and it became clear the United States and Germany were on the brink of war, Elkan and Frohnknecht, to further make it impossible for the Government to seize the German property in their possession, caused to be transferred to the corporation 7,000 out of the 10,000 shares of the stock of the corporation which had been issued to the Frankfort firm as consideration for the transfer of the assets to the corporation, and to [fol. 885] effect this transfer, they did not hesitate to cause the name of the Frankfort firm to be indorsed upon the back of the stock certificate without any apparent authority. The other 3,000 shares of stock they claimed to have bought from the Germans in 1916 at the rate of \$80 a share, when the book value thereof was in excess of \$300 per share and in the face of a profit made by the business in that one year of \$2,000,000. Thus the two individuals claimed to become the owners of all the business and assets formerly belonging to their German principals, less the portion of profits sent to Germany as above stated.

Though they have been in this country since 1906, Elkan and Frohnknecht did not become citizens till 1917. One of them became a citizen after Von Bernstoff got his passports and the other was admitted to citizenship in May, 1917, after we were at war with Germany. There is evidence to indicate that their sudden desire to embrace our citizenship was only a "war measure" after all and that they asked for and obtained the approval of the Frankfort firm to their action.

The foregoing is but a bare outline of what the investigation disclosed, but it is sufficient to indicate, that the transfers were void as against public policy, and in consequence thereof the Alien Property Custodian demanded and took over the entire business and assets of Beer, Sondheimer & Co., as German property.

* * * * *

As to Beer, Sondheimer & Company.—The business of Beer, Sondheimer & Co., is in process of liquidation. This includes not only the corporation Beer, Sondheimer & Co. (Inc.), but also its sub-[fol. 886] sidiaries, the National Zinc Co., the Norfolk Smelting Co., and the Cuba Copper Leasing Co.

When the Custodian took over the business of Beer, Sondheimer & Co. he placed it in control of a board of directors designated by him. Elkan and Frohnknecht maintaining that they owned all the stock of the corporation, filed a claim therefor, and thereafter brought suits to recover the same. These suits, however, have been withdrawn, and the Custodian through said board of directors is proceeding to liquidate the company, and as soon as the business has been liquidated the corporation itself will be dissolved, and Beer, Sondheimer & Co. will entirely have disappeared as a factor in the zinc and copper situation both in the purchase and sale of ores and in the control of mines and smelters. As pointed out above, the Frankfort firm of Beer, Sondheimer & Co. was a stockholder in the Minerals Separation Companies. In 1913 the Frankfort firm transferred to its American branch its interest in this stock, and when the American Minerals Separation was formed in 1916 under the name of Minerals Separation North American Corporation the stockholders of the predecessor, Brithish Minerals Separation Co., became entitled to exchange their shares for the stock of the new company upon the basis of one share of the old stock for two of the new. Thus Beer, Sondheimer & Co. became entitled to receive 65,230 shares of the stock of Minerals Separation North American Corporation. In addition to this amount of stock, Beer, Sondheimer & Co. had received from Minerals Separation North American Corporation 35,000 shares of stock as a consideration for the cancellation of the exclusive agency of Beer, Sondheimer & Co. theretofore [fol. 887] granted by the British Minerals Separation Co., thus giving to Beer, Sondheimer & Co. a total of over 100,000 shares of the stock of Minerals Separation North American Corporation out of a total issue of 500,000 shares. The Custodian took over all of said 100,000 shares (in form of voting trust certificates) as property of Beer, Sondheimer & Co., of Frankfort. This stock will likewise be disposed of by the Custodian and will go into American hands. Beer, Sondheimer & Co.'s control over the important flotation process has been destroyed.

PLAINTIFF'S EXHIBIT 63

Western Union

Mr. Herbert Salinger,
1101 Newhouse Building,
Salt Lake City, Utah.

New York, Oct. 22, 1914.

Please wire on what tonnage we can rely to be shipped during this and next month by Mammoth Copper and when does Needles

expect to resume shipments. Zinc Dust Gold Road shipped yesterday.

Beer, Sondheimer & Co.

[fol. 888] Postal Telegraph-Commercial Cable

Salt Lake, Utah, Oct. 22

Beer, Sondheimer & Co.,
61 Broadway, New York.

Metcalf wires answering my inquiry regarding tonnage as follows: Zinc ore tonnage depends altogether on market price of spelter stop. Needles probably will not start for several months. Tonopah Belmont wire can buy dust five cents cheaper than my offer thirteen cents New York.

Herbert Salinger.

Postal Telegraph-Commercial Cable

Po New York, Oct. 23-14.

Mr. Herbert Salinger,
1101 Newhouse Bldg.,
Salt Lake, Utah.

You can wire Metcalf Spelter four ninety to five cents will reduce price small lots of zinc dust from Bartlesville eleven cents.

Beer, Sondheimer and Co.

[fol. 889] PLAINTIFF'S EXHIBIT 64

Postal Telegraph-Commercial Cable

Salt Lake, Utah, Nov. 23-24.

Beer, Sondheimer & Co.,
61 Broadway, New York:

Kennett wire if spelter above five December tonnage about two hundred.

Herbert Salinger.

Western Union

New York, Nov. 19, 1914.

H. Salinger,
1101 Newhouse Bldg.,
Salt Lake City, Utah:

Please find out from Morning Mine, Needles and Mammoth Copper when they expect to resume shipments of zinc ore since spelter is five cents and better. Please wire.

Beer, Sondheimer & Co.

[fol. 890]

PLAINTIFF'S EXHIBIT 65

Herbert Salinger

Special Representative Beer, Sondheimer & Co.

New York City

Sole Agents National Zinc Company

Works, Bartlesville, Okla.; Argentine, Kan.; Springfield, Ill.

January 20, 1915.

Mr. G. W. Metcalf,
c/o Mammoth Copper Mining Co.,
Kennett, Calif.

DEAR SIR:

With the spelter market again reaching high level, it should be a great incentive for your company to ship as much as possible. Will you kindly let me know what you figure your February production to be? Thanking you in advance for this information, I am
Yours very truly, Herbert Salinger. HS/OB.

[fol. 891]

PLAINTIFF'S EXHIBIT 66

Mammoth Copper Mining Company of Maine

Kennett, California, January 27th, 1915.

Mr. Herbert Salinger,
1101 Newhouse Building,
Salt Lake City, Utah.

DEAR SIR:

Answering your inquiry of Jan. 20th, would say that we are at present building a new zinc sorting plant which should be in shape for operation the latter part of February. It is, however, unlikely that it will be operated soon enough to make any material increase in our February production. Our March production will be considerably increased.

Yours very truly, G. W. Metcalfe, Manager. GWM/RH.

[fol. 892]

PLAINTIFF'S EXHIBIT 67

United States Smelting Company

7/21/15.

Mr. G. W. Metcalf,
Genl. Mgr. Mammoth Copper Mining Co.,
Kennett, Calif.

DEAR SIR:

We submit below terms under which we are willing to receive and pay for your zinc product running 32% zinc or better:

Delivery: F. O. B. Altoona, Kansas.

Sampling: At our works free of charge.

Assaying: Each of the parties hereto will have assays made and compare same. Should they agree within .5% zinc the average of same shall be taken in settlement. Should the assays not agree within .5% zinc an umpire assay shall be made by the following chemists [fol. 893] each to be taken in rotation: Union Assay Office, Salt Lake City, Chrisman & Nichols, Salt Lake City, Von Shultz & Low, Denver, Colo. In the event of umpire, the middle assay will be taken in final settlement.

Payment: \$18.00 per ton for a product containing 40% metallic zinc when spelter is selling in St. Louis according to the Engineering & Mining Journal at \$5.00 per cwt. For each per cent. zinc about 40% a credit of \$1.50 will be allowed.

For each per cent. zinc below 40% a charge of \$2.00 will be made.

For each cent rise in the price of spelter above \$5.00 per cwt. and up to \$11.00 per cwt. a credit of \$.03 will be allowed. No credit for the rise in price above \$11.00 per cwt.

For each cent drop in the price of spelter below \$5.00 per cwt. a charge of \$.05 will be made.

Price of spelter to govern in settlement shall be that as quoted in the E. & M. J. for the E. & M. J.'s week of arrival at destination plant. Lime: 1% allowed free; excess to be charged for at \$1.00 per unit.

Residues made from the tretment of this material to be shipped to the best advantage for your account.

Your acceptance of above terms will constitute a contract between us which may be cancelled upon five days written notice by either party.

Yours very truly, (Sgd.) W. H. Eardley. WHE/W.

[fol. 894]

PLAINTIFF'S EXHIBIT 68

United States Smelting Company

Mr. G. W. Metcalfe,
Gen. Mgr. Mammoth Copper Mining Co.,
Kennett, Calif.

March 8, 1916.

DEAR SIR:

As stated in previous letters, we have figured out a basis which we can apply in figuring the value of the precious metals, namely, gold, silver and copper in Kennett ores.

In December we had a cut off and have taken the actual settlements received for all residues made from all Kennett ores treated up to the cut off and have worked out the basis given below. By applying this basis to each individual lot treated up to the cut off, it would give the Kennett Company \$135.45 more than they actually received. This figures only about 2½¢ a ton so that we are safe in applying this basis on any lots of Kennett ore which are yet unsettled and as per another letter written you today, we will hereafter apply this basis, so that you will get complete settlement on all shipments without waiting until the residues have actually been shipped and returns received.

Basis

Gold: 65% of contents to be paid for at \$19.00 per ounce, providing the gold contents are .03 ounces per ton or more.

Silver: 65% of the contents to be paid for at the New York price for date of shipment.

Copper: 60% of the wet assay to be paid for less 1 unit at the E. & M. J.'s price for cathode copper for the E. & M. J.'s week of shipment less 6¢ per pound.

Treatment charge \$3.85 per ton.

You should now be able to figure the amount you will receive for any of the lots still unsettled for.

Yours very truly, (Sgd.) W. H. Eardley.

[fol. 896]

PLAINTIFF'S EXHIBIT 69

United States Smelting Company

March 20, 1916.

Mr. G. W. Metcalfe,
General Manager Mammoth Copper Mining Co.,
Kennett, California.

DEAR SIR:

Will you kindly change our letter of March 8th giving basis which we are applying on the residue values on all lots shipped prior to

March 1st, for which you have not received settlement, making the quotational date for silver and copper the date of arrival instead of the date of shipment, and week of shipment respectively.

We find that the date of arrival was used in making our calculations on this product.

[fol. 897] Our letter of the 8th giving terms applying on shipments on and after March 1st can remain as it is, as it makes little difference as to what date is used as long as the same rule is always applied.

Yours very truly, (Sgd.) W. H. Eardley

PLAINTIFF'S EXHIBIT 70

United States Smelting Company

George W. Heintz, General Manager

Salt Lake City, Utah, July 23, 1914.

American Metal Co., Ltd.,
825 A. C. Foster Building,
Denver, Colorado.

DEAR SIRs:

The ore referred to in our letter of the 15th inst. is not controlled by the United States Smelting Company's contract with you. It is a concentration proposition, and on the payment for copper hinges whether the material would be smelted in a copper furnace, where the zinc is of value for the purpose of neutralizing the acid in the fume, or whether it will be shipped as zinc concentrates. On the figures given in your favor of the 21st inst. the terms for copper are so poor that we would not advise it being shipped to a zinc smelter. [fol. 898] We really do not see why you cannot pay much better prices for copper, as your recovery in the residues would certainly be high. However, it is a matter for you to decide whether you can make the terms sufficiently attractive to warrant obtaining a considerable tonnage of concentrates or whether it will have to be otherwise treated.

Yours very truly, United States Smelting Company, By
George W. Heintz.

PLAINTIFF'S EXHIBIT 71

The American Metal Company, Limited, of New York

Denver, July 25th, 1914.

Mr. George W. Heintz,
General Manager United States Smelting Company,
Salt Lake City, Utah.

DEAR SIR:

Your favor of the 23rd inst. is at hand. We appreciate what you say on the subject of the terms submitted by us for copper contained in zinc ores and concentrates. In reply we beg to say that our Superintendents at Bartlesville advise that they cannot make a reliable [fol. 899] estimate of the recovery of copper in such ores, particularly in view of the fact that they have no experience, except with material containing a maximum of 2% Cu. Under the circumstances, we would suggest that you arrange to ship us a trial lot of 100 to 200 tons (optional with you), to be settled for on the basis which we will be able to submit to you, after knowing from actual experience what we can do with this material, but the terms in no event to be lower than those proposed in our letter of the 15th inst.

Trusting that you will find this proposition satisfactory, we beg to remain,

Very truly yours, The American Metal Company, Limited.
M. Schott. S-T.

PLAINTIFF'S EXHIBIT 72

Postal Telegraph-Commercial Cable

New York, March 31, 1915.

Mr. Geo. W. Heintz,
Newhouse Building,
Salt Lake City, Utah:

Please telegraph if and when Mr. Lyon is coming to see me regarding Mammoth shipments. In view of our friendly business relations of long standing am entirely willing to try to come amicable [fol. 900] arrangement in personal conference. Considering whole situation but must promptly know whether mutually satisfactory arrangement can be made. Otherwise must put whole matter in hands our lawyers.

B. Elkan.

PLAINTIFF'S EXHIBIT 73

Postal Telegraph-Commercial Cable

Salt Lake City, March 31, 1915.

B. Elkan,
61 Broadway,
New York City:

Have repeated your message to Mr. Lyon, Fifty-five Congress
Street, Boston.

G. W. Heintz.

[fol. 901]

PLAINTIFF'S EXHIBIT 74

Western Union

New York, Feb. 23, 1915.

W. H. Eardley,
Care United States Smelting Co.,
Newhouse Bldg.,
Salt Lake, Ut.:

Can you arrange for me that for Kennett ore variation for spelter
above six one half cents be only three dollars I think this is only
fair under present extraordinary conditions which were never an-
ticipated you no doubt can explain situation to Metcalf and I really
think something ought to be done to meet smelter in fair and equit-
able way considering that ore cannot be smelted for quite some time
and that zinc futures so uncertain and almost unsalable you know
yourself what big chances for loss there are try and fix this for
me. Regards.

Herbert Salinger

[fol. 902]

PLAINTIFF'S EXHIBIT 75

Western Union

Salt Lake City, Utah, Feb. 24, 1915.

Herbert Salinger,
c/o Beer, Sondheimer & Co.,
61 Broadway,
New York City, N. Y.:

Regret cannot make any change Kennett contract.

W. H. Eardley. Chg. U. S. Smelting Co.

PLAINTIFF'S EXHIBIT 76-A

United States Smelting Company

Salt Lake City, Utah

July 28, 1914.

Mr. M. Schott,
 Gen. Mgr. American Metal Company, Ltd.,
 825 A. C. Foster Building,
 Denver, Colo.

DEAR SIR:

The writer just returned to the city and finds correspondence which has passed between yourself and this office relative to the [fol. 903] handling of some zinc product containing copper. The proposition is this; a certain mine has a large tonnage of zinc—copper product blocked out and are endeavoring to determine as to whether or not it would pay to put in a concentrator to make a shipable zinc product, and we desire to know just what payments could be expected for the copper in the event the concentrate idea was carried through. Of course, your quotation for the copper is really no quotation at all and in making an estimate of the possible profit we have ignored it. We do not doubt, however, that it would be agreeable to send you the zinc-copper product and have the residues, made from the product, reshipped for our account.

Of course after you have handled some of the tonnage it might be possible to get together with you on the residue feature and have you make settlement for both the zinc and residues at the same time. In the meantime kindly advise me if it would be satisfactory to your company to handle residues for our account.

Yours very truly, United States Smelting Company, By W. H. Eardley. WHE:LA.

P. S.—It is really a shame to have any smelter quotations bandied about with such carelessness.

[fol. 904]

PLAINTIFF'S EXHIBIT 77-A

The American Metal Company, Limited, of New York

Denver, Colorado, July 20th, 1914.

United States Smelting Company,
 Salt Lake City, Utah.

DEAR SIRS:

We beg to acknowledge receipt of your favor of the 15th instant, with regard to sulphide concentrates containing 4.4% copper. We have communicated with our works, in order to ascertain what recovery we can figure on, and as soon as we have their advices, we shall communicate with you.

Trusting that this short delay will not inconvenience you, we remain,

Very truly yours, The American Metal Company, Limited.
(Sgd.) H. F. Putzel. P. T.

[fol. 905]

PLAINTIFF'S EXHIBIT 78-A

The American Metal Company, Limited, of New York

Denver, July 21st, 1914.

Mr. W. H. Eardley,
c/o United States Smelting Company,
Salt Lake City, Utah.

DEAR SIR:

We beg to confirm our letter to you of yesterday, and are now in receipt of advice from the works in regard to the question of payment for copper, on the strength of which we are prepared to pay you for this metal, as follows:

50% of dry assay (i. e., wet less 1.3 units) at casting copper price less six cents per pound.

On a material assaying as per analysis sent us, namely, 4.4% Cu., this will figure out as follows:

	4.4%	wet
Mines	1.3	dry

3.1

59% = 1.55 Cu. @ (say 14¢ — 6¢) 8¢ per lb. = \$1.60 per unit
= \$2.16 per ton of ore.

As you are aware, the contract between us does not provide for payment of copper, and while we are always ready to fairly meet unforeseen conditions, we beg you to for the present consider the above concession to be applicable only to 1,000 tons. In case we find [fol. 906] that we can safely continue paying for copper values in your ores on the above basis, we shall be pleased to do so, and advise you accordingly.

Trusting that the above will be satisfactory to you, and hoping to hear from you to this effect, we beg to remain

Very truly yours, The American Metal Company, Ltd., Per
M. Schott. S-T.

PLAINTIFF'S EXHIBIT 79-A

United States Smelting Company
Salt Lake City, Utah

July 27th, 1914.

The American Metal Company, Limited,
825 A. C. Foster Building,
Denver, Colorado.

GENTLEMEN:

We are in receipt of your favor of the 25th inst., advising further with regard to terms on which you could handle zinc-copper product. We will take the matter under consideration on this basis, and in case we decide to make the experiment, will ship you a trial lot of 100 or 200 tons.

Yours very truly, United States Smelting Company. W. A.
H. W. A. H.-LA.

[fol. 907]

PLAINTIFF'S EXHIBIT 80-A

The American Metal Company, Limited, of New York

Denver, July 30th, 1914.

Mr. W. H. Eardley,
United States Smelting Company,
Salt Lake City, Utah.

DEAR SIR:

Zinc-Copper Concentrates

Your favor of the 28th inst. is at hand. Your proposition, that we ship the residue resulting from this material for your account, is a very fair one, and we are inquiring with the works today as to whether this material can be treated to advantage without being mixed, in which event we shall be glad to handle a trial shipment of, say, two hundred tons on the basis proposed by you. In case this is done, and works out satisfactorily for both yourselves and ourselves, we shall be glad to arrange for the entire output of the property in question. There is one difficulty which we can see, and which we do not know how it can be overcome, namely: we are equipped at both our Bartlesville as well as our Collinsville works for the uniform handling of all our residues, and we do not know to what extent the necessity of holding the material resulting from these ores separate, would interfere with the general scheme employed [fol. 908]. However, we shall know about this early next week, and will advise you accordingly.

Very truly yours, The American Metal Company, Limited.
M. Schott. S-T.

PLAINTIFF'S EXHIBIT 81

United States Smelting Company
George W. Heintz, General Manager
Salt Lake City, Utah

August 4, 1914.

American Metal Company,
825 A. C. Foster Bldg.,
Denver, Colo. •

GENTLEMEN:

We have your letter of July 30th and note that it will be agreeable to reship residues made from zinc copper concentrates, for our account. We will bear this in mind in determining as to whether we will concentrate the produce or ship crude.

Yours very truly, (Sgd.) W. H. E. Copy—8/16/14—Ms.

[fol. 909]

PLAINTIFF'S EXHIBIT 82

The American Metal Company, Limited, of New York

Denver, August 6th, 1914.

Mr. W. H. Eardley,
c/o United States Smelting Company,
Salt Lake City, Utah.

DEAR SIR:

Zinc-Copper Concentrates

Your favor of the 4th inst. is at hand. We are also in receipt of a letter from the works, advising us that they can only by actual trial, determine the question of whether this material can be handled to advantage without being mixed in the kilns, and whether the resulting residue can be treated separately.* For this reason, we would suggest that you arrange to have at least one hundred tons of this product produced and shipped to us for trial purposes, when we have no doubt but what the question of terms can be arranged to mutual satisfaction.

Hoping that you will look favorably upon this proposition, and looking forward to your early advice, we beg to remain

Very truly yours, The American Metal Company, Limited.
M. Schott. S-T.

*without unduly interfering with the general scheme of operations.

[fol. 910]

PLAINTIFF'S EXHIBIT 83

Aug. 8, 1914.

American Metal Company, Ltd.,
825 A. C. Foster Bldg.,
Denver, Colo.

GENTLEMEN:

We have your letter of August 6th relative to the handling of zinc copper concentrates.

As soon as conditions are more settled we will undoubtedly send you a trial shipment of this product and later determine the method of handling the future output.

Yours very truly, — — —.

PLAINTIFF'S EXHIBIT 84

The American Metal Company, Limited, of New York

August 12, 1914.

Mr. W. H. Eardley,
c/o U. S. Smelting Company,
Salt Lake City, Utah.

DEAR SIR:

Zinc Copper Concentrates

In the rush of questions which have suddenly come up, owing to the European situation, we find that we entirely overlooked acknowledging receipt of your favor of the 4th instant,—for which oversight we ask your indulgence.

We trust that you will see your way to forward us a trial lot of your concentrates at the earliest possible moment and we beg to assure you that we will endeavor to settle for this material on the best possible basis. We are very anxious to get what zinc concentrates we can, and would thank you to advise us as to the quantity of this class of material which you could ship, provided we could pay you satisfactory terms. Also, please let us know how long it would take for you to start shipments and at what rate this material would come along, per month.

We are not quite clear as to the conditions surrounding this proposition, and for all we know, before the shipments can be made, a mill will have to be built.

We should appreciate your early reply.

Yours very truly, The American Metal Company, Ltd., By
M. Schott. MS/Mcf.

P. S.—Huff concentrates containing residue values:

Is there any chance of your shipping to us, and if so how soon and at what rate per month.

What about shipments from Hailey? Is there any chance of getting anything in the near future.

H. F. P.

[fol. 912]

PLAINTIFF'S EXHIBIT 85

August 14, 1914.

American Metal Company,
825 A. C. Foster Bldg.,
Denver, Colo.

GENTLEMEN:

We have your letter of August 12th, and in reply beg to state that we have written for additional information relative to the zinc-copper concentrates, and will advise you just as soon as we hear relative to the matter.

Do not think there is much possibility of our shipping you any Huff concentrates in the near future, as the property from which we secure the product is not shipping at present.

Yours very truly, — — —. WHE: LA.

[fol. 913]

PLAINTIFF'S EXHIBIT 86

United States Smelting Company
George W. Heintz, General Manager
Ore Purchasing Department
Salt Lake City, Utah

August 25, 1914.

Mr. G. W. Metcalfe,
Mgr. Mammoth Copper Mng. Co.,
Kennett, Calif.

DEAR SIR:

We have your letter of the 22nd, relative to the shipment of zinc product from the Mammoth Mine. For your information, will state that it is possible at the present time to secure a better rate for this product than any rate we have received heretofore, in fact with the present price for spelter it figures about 60¢ per ton better than a contract the United States Smelting Company recently entered into [fol. 914] besides paying for the copper in excess of one unit, at the E. & M. J. price less 5¢ per pound.

It is very doubtful whether we can continue to receive for any length of time the rates now offered and we thought it might be advantageous to make a contract covering whatever zinc shipments you have to make during the next year or two. Will you kindly advise regarding this matter also as to whether you desire us to

draw up a contract in behalf of the Mammoth Copper Mining Company. As soon as we hear from you relative to the contents of the car ready to ship we will advise you billing instructions on this car.

Yours very truly, United States Smelting Company, By W. H. Eardley. WHE: LA.

You might wire about contract matter as quotations may be withdrawn any day.

[fol. 915]

PLAINTIFF'S EXHIBIT 87

Salt Lake City, Utah, Mar. 25, 1915.

American Metal Co., Ltd.,
825 A. C. Foster Bldg.,
Denver, Colorado.

GENTLEMEN:

We favored your company by diverting elsewhere the larger part of our Needles concentrates for the month of March, and we find that it will be possible to divert practically all of this tonnage for the month of April and later, if you so wish.

We would ask, however, that in exchange for this accommodation, that you would accept four or five hundred tons per month, commencing in April, and during the period of this diversion, our excess tonnage produced at Kennett. This is a crude product and will run 40% zinc, carrying in addition to other residue values, about 2% or 3% of copper. If it is possible for you to accommodate us by handling four or five hundred tons of this product monthly in exchange for possibly one thousand tons of the Needles product, we can arrange to make the exchange accordingly.

If, however, you cannot see your way clear to do this we may find it necessary to replace the Needles tonnage elsewhere with this smaller tonnage and forward the Needles tonnage to you.

Please advise.

Yours very truly, United States Smelting Company. (Signed)
W. A. Howard.

[fol. 916] P. S.—The terms of the Kennett product will be the same as the Needles contract, except we are receiving payment for copper over 1%, such 1% off wet assay and 5¢ off New York price.

United States Smelting Company. (Signed) W. H. Howard.
3/29/15-Ms.

PLAINTIFF'S EXHIBIT 88

American Metal Co., Ltd.,
825 A. C. Foster Bldg.,
Denver, Colorado.

Mar. 25, 1915.

GENTLEMEN:

We favored your company by diverting elsewhere the larger part of our Needles concentrates for the month of March, and we find

that it may be possible to divert practically all of this tonnage for the month of April and later if you so wish.

We would ask, however, that in exchange for this accommodation, that you would accept four or five hundred tons per month, commencing in April, and during the period of this diversion, our excess tonnage produced at Kennett. This is a crude product and will run 40% zinc, carrying in addition to other residue values, about 2% or 3% copper. If it is possible for you to accommodate us by handling four or five hundred tons of this product monthly in exchange [fol. 917] change for possibly one thousand tons of the Needles product, we will try to arrange for the exchange accordingly.

If, however, you cannot see your way clear to do this we may find it necessary to replace the Needles tonnage elsewhere with this smaller tonnage and forward the Needles tonnage to you.

Please advise.

Yours very truly, — — —. WAH: MM.

P. S.—The terms of the Kennett product will be the same as the Needles contract, except we are receiving payment for copper over 1%, such 1% off wet assay and 5¢ off New York price.

PLAINTIFF'S EXHIBIT 80

The American Metal Company, Limited, of New York

April 1, 1915.

The United States Smelting Company,
Sale Lake City, Utah.

DEAR SIRs:

Your favor, dated March 25th, has been kept here for reply by the signer.

The present agreement between us, as you are aware, is as follows:

No shipments to be made under the United States Smelting contract until the 1st of June of this year, and under the Needles contract [fol. 918] tract, shipments until the 1st of June of this year are not to exceed 800 tons per month.

As we understand your proposition, you will agree not to make any shipments, neither under the U. S. Smelting contract nor under the Needles contract, provided we agree, during the period of such diversion, to accept up to 500 tons per month of ore from your property at Kennett, California, at the terms of the Needles contract, excepting that we are to make payment for the copper contained in these ores.

We appreciate your attitude in this matter, and should like to accommodate you, and beg to suggest the following:

We to take up to 500 tons per month of Kennett ore, commencing with the present month, up to the end of September. The terms to be the same as provided for in the Needles contract, excepting copper, for which we are to pay as follows:

65% of dry contents (i. e. wet less one unit) at casting copper price ruling on date of arrival at the zinc works, less 5¢ per pound.

During the corresponding period of April up to the end of September of this year, no shipments are to be made to us under the Needles and U. S. Smelting Company contracts.

It goes without saying, that in the event of your not accepting this proposition, the agreement in force at present continues until the end of May, as provided for.

Very truly yours, The American Metal Company, Limited.
M. Schott. MS-MSW.

[fol. 919]

PLAINTIFF'S EXHIBIT 90

United States Smelting Company
Salt Lake City, Utah

Apr. 5, 1915

American Metal Co., Ltd.,
Mr. M. Schott, Manager,
Denver, Colorado.

DEAR SIR:

The writer just returned to the city and found your letter of April 1st in reply to one from this office under date of March 25th, relating to the handling of some zinc product available for shipment at Kennett.

Am going personally into the matter and will advise you in a few days as to just what tonnage is available for shipment, and also as to the possibility of diverting all the Needles product elsewhere in the event we arrive at agreement on the tonnage under consideration.

Yours very truly, United States Smelting Company.
(Signed) W. H. E. 4/7/15—Ms.

[fol. 920]

PLAINTIFF'S EXHIBIT 91

United States Smelting Company
Salt Lake City, Utah

April 14, 1915.

American Metal Company, Ltd.,
825 A. C. Foster Building,
Denver, Colorado.

GENTLEMEN:

Providing we can arrange to divert the entire production of zinc concentrates at Needles and zinc produced at Midvale and elsewhere, from June 1st to April 1st, so that no shipments would be made you on Needles or U. S. Smelting Co's contracts during that period,

would you be willing to accept 500 to 1000 tons per month of Kennett zinc on the basis as outlined in your letter of April 1st? If so, just what would be the maximum tonnage you would receive of this product?

Kindly let us hear from you at once, so that we can advise you definitely as to arrangements we are able to make.

Yours very truly, United States Smelting Company,
By W. H. E. WHE:MM.

[fol. 921]

PLAINTIFF'S EXHIBIT 92

The American Metal Company, Limited, of New York

April 17, 1915.

The United States Smelting Company,
Salt Lake City, Utah.

DEAR SIRs:

Attention of Mr. W. H. Eardley

Your favor of the 14th inst. is at hand.

In reply we beg to say that we are prepared to take up to 750 tons per month of Kennett zinc ores, at the terms outlined in our letter of April 1st, shipments to go forward during the months of June, July, August and September. In consideration of this agreement on our part, no shipments to be made to us by you during the months mentioned, under the Needles contract, as well as under the contract with the U. S. Smelting Company.

As you are aware, your Needles product averages 40% zinc. We understand from your advice on this subject, that the product from Kennett will average the same amount of zinc per ton. However, not being familiar with this Kennett material, we deem it necessary to attach the following condition to the terms outlined in our letter of April 1st:

Whenever the monthly average of Kennett zinc ores or concentrates is below 40% zinc, a deduction to be made from the price [fol. 922] variation of \$4, equal to 10¢ for each unit of zinc below 40%. Fractions in proportion.

For instance, in case the zinc contains on an average 35% zinc, the price variation to be \$3.50 instead of \$4.00. No product to be shipped running below 35% in zinc.

Your acceptance of this proposition shall constitute a binding agreement between us.

Very truly yours, The American Metal Company,
Limited, Per M. Schott.

P. S.—We expect to be in a position by the end of next week, to advise you with regard to the question of lead ores discussed between Mr. Eardley and the signer, and trust that in case we find ourselves in a position to make some arrangement with you, that Mr. Eardley will be able to come to Denver to draw up the necessary papers.

[fol. 923]

PLAINTIFF'S EXHIBIT 93

The American Metal Company, Limited of New York

Denver, April 24th, 1915.

United States Smelting Company,
Salt Lake City, Utah.

Attention of Mr. W. H. Eardley

DEAR SIR:

Under the agreement between us, confirmed in your letter addressed to us on March 5th, it is provided that no shipments are to be made to us under the United States Smelting Company's contract until we give notice to you to resume shipments.

We make free to call your attention to this fact as we find that the language used in our letters addressed to you on April 1st and April 17th respectively is the result of inadvertence, and might be misleading.

We beg you to understand, therefore, that our proposition regarding Kennett ores has no bearing whatsoever on the above mentioned agreement of March 5th, regarding suspension of shipments to us under the United States Smelting Company's contract.

Very truly yours, The American Metal Company, Limited.
M. Schott. MS-T.

[fol. 924]

PLAINTIFF'S EXHIBIT 94

United States Smelting Company
George W. Heintz, General Manager
Ore Purchasing Department
Salt Lake City, Utah

Apr. 5, 1915

Mr. G. W. Metcalfe,
Kennett, Calif.

DEAR SIR:

We have had some correspondence with the American Metal Company with reference to their accepting some zinc tonnage from Kennett. They have expressed their willingness to accept five hundred tons per month of the Kennett product from now until the 1st of October, providing we will divert all of the Needles product to some other plant, and make no shipments to them from Midvale during this period.

[fol. 925] The terms under which they would be willing to accept the Kennett product are the same as the terms you have with the Beer-Sondheimer Company, with the exception that the price variation would be 4¢ instead of 5¢, and the copper would be accounted for as follows: 65% of the dry assay (wet less one unit) at the cast-

ing copper price date of arrival, less 5¢ per pound. With spelter at \$8.00 at St. Louis, estimating the copper content at 2%, this would figure about \$3.70 per ton less than you are now getting under the Beer-Sondheimer contract.

Kindly advise if you would be interested in sending any of your product under this arrangement, providing same were made, or do you prefer shipping the limited tonnage as at present and taking a chance on the price of zinc staying at its present level?

Yours very truly, United States Smelting Company, By W.
H. Eardley. WHE:MM.

[fol. 926]

PLAINTIFF'S EXHIBIT 95

Mammoth Copper Mining Company of Maine

The U. S. Smelting Co.,
Ore Purchasing Dept.,
Newhouse Building,
Salt Lake City, Utah.

April 10th, 1915.

GENTLEMEN:

Answering your letter of April 5th, as to possibility of selling some of our zinc product to The American Metal Company, would say that I think it desirable to sell to them as much of our zinc ore as possible.

Even though Beer Sondheimer were willing to accept the 1,200 tons monthly which we are now shipping them, we could still produce at least 500 tons a month in addition.

[fol. 927] I think the proper course would be for us to offer all of this ore to Beer, Sondheimer & Company, and if they refuse it, sell it to The American Metal Company or anybody that we can; suing Beer, Sondheimer & Co. for the difference in the prices received.

It is not likely that we will be able to continue such shipments until the 1st of October, as, in all probability, our zinc ore will at that rate be exhausted within four months.

Yours very truly, G. W. Metcalfe, Manager. GWM. RH.

[fol. 928]

PLAINTIFF'S EXHIBIT 96

United States Smelting Company

Mr. G. W. Metcalfe,
Kennett, Calif.

February 24, 1915.

DEAR SIR:

Replying to your favor of the 22nd, relative to the shipment of low grade zinc ores, beg to advise that all zinc smelters have with-

drawn entirely from the market, as far as the purchase of zinc sulphide ores are concerned, irrespective of their grade. We only today received a telegram from Beer, Sondheimer, pleading for additional protection on the Kennett contract, by accepting \$3.00 variation above $5\frac{1}{2}\text{¢}$ instead of 5¢ . We have notified them, however, that we cannot make any change in the present contract. It [fol. 929] is quite likely that we will be notified that no product will be accepted, except that carrying the minimum percentage, as outlined in the contract.

We had the question of shipment of Kennett zinc up with other zinc smelters today, and none were willing to make any kind of a proposition, even basing the quotations on 60 or 90 days after receipt of the product. If there is any change in the situation, or any plant that will later accept zinc sulphide product running less than that specified in the Kennett contract, we will be pleased to advise you accordingly.

Yours very truly, W. H. Eardley. WHE: MM.

PLAINTIFF'S EXHIBIT 97

February 22d, 1915.

The U. S. Smelting Co.,
Ore Purchasing Dept.,
Newhouse Building,
Salt Lake City, Utah.

GENTLEMEN:

I note in "The Mining Press" for February 20th, that the zinc smelters have announced that they will accept ore containing 24% and up. If this is authentic, and if the zinc smelter to which we are [fol. 930] shipping our zinc ore would allow us to ship down to 24%, it would save us quite a little money, as we would be able to ship all the ore we are now obtaining from our Yolo zinc ore body without sorting, which would run at present about 27% zinc. Please make special inquiry to see if they will accept down to 24%.

Yours very truly, G. W. M., Manager. GWM: RH.

[fol. 931]

PLAINTIFF'S EXHIBIT 110

Statement of Various Ores Purchased under Contract, Showing Amount Shipper Would Receive on 14c. Spelter Market or Approximately the Average Price, from 7/21/15 to 2/26/16

Date of agreement	Company	Amount shipper recd. on 14c. spelter market for 40% ZN f. o. b. smelter
7/21/15	Mammoth Cop. M. Co., \$18 for 40% @ \$5 spelter—unit var. \$1.50 up \$2 down Price var. 3c. to \$11 max.	36.00
6/29/15	Big Four Ex. Co., Actual recovery Min. toll charge \$60 used 80% recovery.....	29.60
7/ 2/15	Bolivar M. T. & T. Co., \$18 for 40% @ \$5 spelter—unit var. \$1.50 up \$2 down Price var. 3c. to \$11 max.	36.00
8/10/15	Victor Reduction Co., \$20 toll charge plus 65% of amount realized above \$40, used 80% recovery	37.36
8/12/15	Estate of Patrick Clark, \$20 toll charge plus 60% of amount realized above \$40, used 80% recovery	39.84
9/18/15	Silverton Mines Ltd., \$20 toll on \$5 spelter plus \$2.50 for each cent rise up to \$8 & \$4.50 for each cent to \$13.00, and \$5.50 for each cent above \$13. Used 80% recovery	34.10
10/ 4/15	F. J. Lyons, Flat price of \$20 for 40%....	20.00
12/18/15	Pingrey, \$17 for 40% @ \$5 spelter—unit var. \$1.50 up, Price var. 4c to \$7.00 3c. to \$14.00 max.	44.00
1/15/16	Poland M. Co., \$17 for 40% @ \$5 spelter—unit var. \$1 up \$1.50 down Price var. 3c. to \$12 max.	38.00

[fol. 932]

PLAINTIFF'S EXHIBIT 111A

Agreement

July 21, 1915.

This agreement made June 28th, 1915, by and between the United States Smelting Company, first party, a corporation of Maine, hereinafter called "Smelting Company," and the Butte & Superior Copper Company, Limited, second party, a corporation of Arizona, hereinafter called the "Mining Company," witnesseth:

It is mutually agreed by and between the parties as follows:

(1) The Mining Company agrees to ship and deliver to the Smelting Company at its zinc smelter at or near La Harpe, Kansas, and the Smelting Company agrees to receive from and treat for the Mining Company, a sufficient quantity of zinc ores and concentrates which, together with the ores and concentrates covered by that cer-

tain agreement of June 21st, 1915, wherein it is agreed between the parties that there shall be treated by the Smelting Company for the Mining Company a total of 4,125 wet tons of ores and concentrates at the rate of 825 wet tons per month, and which the Smelting Company is desirous of, smelting at its La Harpe plant, shall be necessary to keep the said zinc smelting plant aforesaid operating at full capacity between August 1, 1915 and January 1st, 1916. The Mining Company shall have on hand at said smelter sufficient ores and concentrates so that the Smelting Company may on August 1st, 1915, commence smelting said ores and concentrates. [fol. 933] and the Mining Company shall continue to deliver to said Smelting Company sufficient ores and concentrates so that the Smelting Company may continue the treating of said ores and concentrates with said smelter running at full capacity during all of said period, it being understood that said smelter shall consist of three blocks of furnaces and two roasting kilns, with a total capacity of approximately sixteen hundred to eighteen hundred tons per months. The Smelting Company agrees to have bins prepared and ready for the receipt of ores and concentrates to be shipped and delivered hereunder, not later than July 20th, 1915.

(2) The Mining Company shall pay to the Smelting Company a working charge for the smelting of such zinc ores and concentrates as shall be smelted by the Smelting Company hereunder, as follows:

A minimum working charge of Thirty-six and 25/100ths (\$36.25) Dollars per dry ton of 2,000 pounds avoirdupois when the price of spelter does not exceed thirteen and 75/100ths (13-75/100) cents per pound. For each cent per pound increase in the price of spelter above thirteen and 75/100ths (13-75/100ths) cents per pound there shall be added Three (3.00) Dollars per ton to said working charge of seventy (\$70.00) Dollars per ton; fractions pro rata.

(3) The working charges mentioned in the last preceding paragraph shall be based upon and determined by the actual sales and deliveries as made by the Mining Company, based on East St. Louis delivery against spelter produced under this agreement. The Mining Company shall furnish the Smelting Company with true copies of contracts and memoranda of sales of spelter made or entered into by the Mining Company and the books of the Mining Company containing records of such sales and receipts thereon, as well as the original agreements or memoranda of sales, shall be open to inspection by the Smelting Company.

(4) The Mining Company shall deliver such ores and concentrates F. O. B. railroad cars at the Smelting Company's said plant; provided, however, that should the Smelting Company under the option hereinafter granted to it, during a period of disability to operate said La Harpe smelter, direct deliveries to any plant of the Smelting Company where the freight rate exceeds the freight rate to La Harpe, Kansas, the Smelting Company shall pay such excess freight charges to the Mining Company.

(5) The Smelting Company shall treat all ores and concentrates delivered to it hereunder at its zinc smelter by modern methods; with due diligence and skill, and without mixing with any other ores or concentrates. The Smelting Company guarantees an average monthly recovery of not less than eighty (80) per cent. of the zinc contents of said ores and concentrates, provided such zinc ores and concentrates do not average less than fifty (50) per cent. metallic zinc. If an average recovery of eighty (80) per cent. be not obtained, or if the Mining Company shall believe that the recoveries made by the Smelting Company are not as good as they should be, the Mining Company shall have the right to have its representative immediately make an investigation, and the Smelting Company shall make any change in the treatment of such zinc ores and [fol. 935] concentrates as are requested by the Mining Company, provided such requested changes are in accordance with modern zinc smelting practice and do not require a radical remodeling of the plant.

(6) The Smelting Company shall deliver to the Mining Company F. O. B. railroad cars at its smelting plant where such ores and concentrates are treated, all spelter and the residue made from smelting the said zinc ores and concentrates. Deliveries of such spelter and residue respectively shall be made F. O. B. cars as above provided as soon as the Smelting Company shall have on hand sufficient spelter to complete a carload shipment of spelter or shall have on hand two hundred (200) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of either spelter or residue, the Smelting Company shall comply with such request, and in such event the Mining Company shall pay to the Smelting Company all extra costs and expenses incurred by the latter by reason thereof.

In the event the freight rate from the plant at which such ores or concentrates are treated is in excess of the freight rate then in effect on spelter from La Harpe, Kansas to East St. Louis, Illinois or on residue from La Harpe, Kansas to the point where such residues are shipped, the Smelting Company shall pay such excess freight rate to the Mining Company.

(7) The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to operations and records pertaining to the receipt, delivery, metallurgy and treatment of said ores and concentrates.

[fol. 936] (8) The Smelting Company shall, on or before the fifth day of each month during the continuance of this agreement, render to the Mining Company a statement of all ores and concentrates treated hereunder during the preceding calendar month, and the Mining Company shall, on or before the 20th day of the month in which such statement is rendered, pay to the Smelting Company, at its office in Boston, Mass., such sum as shall be due the Smelting Company for the treatment of ores and concentrates covered by such statement.

(9) Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party, because of fires, flood, riots, strikes, cyclones, windstorms, contingencies or transportation or any other cause beyond the control of the party so prevented or delayed, whether stated herein in express terms or not the party so prevented or delayed shall be excused from performing any such covenant while so prevented or delayed; provided, however, that in the event of any such disability on the part of the Smelting Company, and upon serving immediate notice upon the Mining Company, it shall have the right during such disability, of treating the ores and concentrates covered by this agreement and the agreement of June 21st, 1915, at any other plant of the Smelting Company where it is not prevented from so doing, and upon serving notice upon the Mining Company to such effect the latter shall with reasonable diligence and during the period of disability at the La Harpe plant, cause ores and concentrates to be shipped and delivered to the Smelting Company at the plant designated, but the Mining Company shall [fol. 937] be excused for any delays in deliveries to such new plant except for negligence on the part of the Mining Company. But during such disability the Mining Company may dispose of any ores or concentrates not taken by the Smelting Company, such privilege to continue, however, only until notified by the Smelting Company of the removal of the disability.

Should the said smelting plant at La Harpe, Kansas, for any reason be destroyed, and the Smelting Company does not elect to treat the ores and concentrates under this agreement at one of its other plants, then the Mining Company shall no longer be obligated to deliver—and the Smelting Company shall no longer be obligated to receive, any ores or concentrates hereunder, except as hereinafter provided in paragraph 10.

(10) It is understood and agreed that after the Smelting Company shall have treated a total tonnage of 4,125 wet tons under this agreement or the agreement of June 21st, 1915, or under both agreements, then the Smelting Company shall not thereafter be obligated to treat said ores and concentrates under the agreement of June 21st, 1915, at any other than the Smelting Company's zinc smelting plant at or near La Harpe, Kansas, but this shall in no other respect modify the agreement of June 21st, 1915, except, to-wit: The working charges therein provided for shall be based upon and determined by the actual sales and deliveries thereunder of prime western spelter made by the Mining Company based on East St. Louis delivery against spelter to be produced under the said agreement of June 21st, 1915. The Mining Company shall furnish the Smelting Company with true copies of contracts and memoranda [fol. 938] of sales of such spelter made or entered into by the Mining Company, and the books of the Mining Company containing records of the sales thereof, as well as the original agreements or memoranda of such sales, shall be open to inspection by the Smelting Company.

(11) Should any difference or dispute arise between the parties as to the interpretation of this contract or any of its provisions, the same shall be settled by arbitrators, and in such event each party shall select an arbitrator to whom such dispute or difference shall be referred. In the event that such arbitrators so selected do not agree, they shall select a third arbitrator, and the decision of the majority of such arbitrators shall govern.

(12) The provisions of this agreement shall inure to the benefit of and be binding upon, the parties hereto, their, and each of their successors and assigns.

In witness whereof the parties hereto have caused this instrument to be executed by their respective representatives thereunto duly authorized, the day and year first above written.

United States Smelting Company, By (SGD.) W. H. Eardley, Its Agent. Butte & Superior Copper Company, Limited, By (SGD.) Chas. Borning, Its Agent.

[fol. 939]

PLAINTIFF'S EXHIBIT 111B

Agreement

This agreement made June 21st, 1915, by and between the United States Smelting Company, first party, a corporation of Maine, hereinafter called "Smelting Company," and the Butte & Superior Copper Company, Limited, second party, a corporation of Arizona, hereinafter called the "Mining Company,"

Witnesseth:

It is mutually agreed by and between the parties as follows:

(1) The Mining Company agrees to ship and deliver to the Smelting Company at such zinc smelter in Kansas, Missouri or Oklahoma as the Smelting Company may designate, and the Smelting Company agrees to receive from, and treat for, the Mining Company, a total of four thousand one hundred and twenty-five (4,125) wet tons of zinc ores or concentrates. The Mining Company shall have on hand at the Smelter to be designated by the Smelting Company sufficient ores and concentrates so that the Smelting Company may on August 1, 1915, commence the smelting of such ores and concentrates, and the Mining Company shall deliver to said smelter sufficient ores and concentrates so that the Smelting Company may continue the treatment of such ores and concentrates at the rate of approximately twenty-seven and one-half (27½) tons per day operating the said smelter continually so long as ores and concentrates are to be delivered by the Mining Company to the Smelting Company hereunder. The Smelting Company agrees to have bins pre-[fol 940] pared and ready for the receipt of ores and concentrates to be shipped and delivered hereunder, not later than July 20, 1915.

The Smelting Company shall accept from the Mining Company and treat for it a minimum of eight hundred and twenty-five (825) tons per month until there have been delivered hereunder for treatment as herein provided a total of four thousand one hundred and twenty-five (4,125) wet tons of such ores and concentrates.

(2) The Mining Company shall pay to the Smelting Company a working charge for the smelting of such zinc ores and concentrates as shall be smelted by the Smelting Company hereunder, as follows:

Fifteen Dollars (\$15.00) per dry ton of 2,000 pounds avoirdupois when the price of spelter is five cents (5¢) per pound or less. For each cent increase in the price of spelter above five cents per pound and up to and including ten cents per pound there shall be added Two Dollars (\$2.00) per ton, fractions pro rata. For each cent increase in the price of spelter above ten cents per pound there shall be added Three Dollars (\$3.00) per ton, fractions pro rata. The maximum working charge to be paid by the Mining Company to the Smelting Company for the smelting of ores or concentrates hereunder shall be Sixty Dollars (\$60.00) per ton.

(3) The working charges mentioned in the last preceding paragraph shall be based upon and determined by the average monthly East St. Louis price of prime Western spelter for the calendar month in which the product is treated, as shown by the Engineering & Mining Journal quotations for such period.

[fol. 941] (4) The Mining Company shall deliver such ores and concentrates at the zinc plant of the Smelting Company to be designated by the latter from time to time; such deliveries of the Mining Company to be made F. O. B. railroad cars at the Smelting Company's plant, provided, however, that should the Smelting Company direct deliveries to any plant where the freight rate exceeds the freight rate to Altoona, Kansas, the Smelting Company shall pay such excess.

If the Smelting Company desires to smelt any of said ores or concentrates at one of its plants not then being used for such purpose, it shall notify the Mining Company where to make shipments, and may also request diversions of shipments, in which event the Mining Company will comply with such request, but the Mining Company shall be excused for any delays in deliveries to such new plant except for negligence on the part of the Mining Company.

(5) The Smelting Company shall treat all ores and concentrates delivered to it hereunder at its zinc smelter by modern methods, with due diligence and skill, and without mixing with any other ores or concentrates. The Smelting Company guarantees an average monthly recovery of not less than eighty (80) per cent. of the zinc contents of said ores and concentrates, provided such zinc ores and concentrates do not average less than fifty (50) per cent. metallic zinc. If an average recovery of eighty (80) per cent. be not obtained, or if the Mining Company shall believe that the recoveries made by the Smelting Company are not as good as they should be, the Mining Company shall have the right to have its representative im-[fol. 492] mediately make an investigation, and the Smelting Company shall make any change in the treatment of such zinc ores and

concentrates as are requested by the Mining Company, provided such requested changes are in accordance with modern zinc smelting practice.

(6) The Smelting Company shall deliver to the Mining Company F. O. B. railroad cars at its smelting plant where such ores and concentrates are treated, all spelter and the residue made from smelting the said zinc ores and concentrates. Deliveries of such spelter and residue shall be made F. O. B. cars as above provided as soon as the Smelting Company shall have on hand sufficient spelter to complete a carload or two hundred (200) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of either spelter or residue, the Smelting Company shall comply with such request, and in such event the Mining Company shall pay to the Smelting Company all extra costs and expenses incurred by the latter by reason thereof.

In the event the freight rate on spelter from the plant at which such ores or concentrates are treated, to East St. Louis, Illinois, is in excess of the freight rate then in effect between Altoona, Kansas, and East St. Louis, Illinois, the Smelting Company shall pay such excess to the Mining Company.

In the event that the freight rate on residues from the plant at which such ores or concentrates are treated, to the point where such residues are shipped; is in excess of the freight rate in effect from Altoona, Kansas, the Smelting Company shall pay such excess to the Mining Company.

(7) The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to op-[fol. 943] erations and records pertaining to the receipt, delivery, metallurgy and treatment of said ores and concentrates.

(8) The Smelting Company shall, on or before the fifth day of each month during the continuance of this agreement, render to the Mining Company a statement of all ores and concentrates treated hereunder during the preceding calendar month, and the Mining Company shall, on or before the 20th day of the month in which such statement is rendered pay to the Smelting Company at its office in Boston, Mass., such sum as shall be due the Smelting Company for the treatment of ores and concentrates covered by such statement.

(9) Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party, because of fires, floods, riots, strikes, cyclones, wind storms, contingencies of transportation or any other cause beyond the control of the party so prevented or delayed, whether stated herein in express terms or not, the party so prevented or delayed shall be excused from performing any such covenant while so prevented or delayed.

(10) Should any difference or dispute arise between the parties as to the interpretation of this contract or any of its provisions,

the same shall be settled by arbitrators, and in such event each party shall select *on* arbitrator to whom such dispute or difference shall be referred. In the event that such arbitrators so selected do not agree, they shall select a third arbitrator, and the decision of the majority of such arbitrators shall govern.

[fol. 944] (11) The provisions of this agreement shall inure to and be binding upon the parties hereto, their and each of their, successors and assigns.

In witness whereof the parties hereto have caused this instrument to be executed by their respective representatives thereunto duly authorized, the day and year first above written.

United States Smelting Company, By W. H. Eardley, Its Agent. Butte & Superior Copper Company, Limited, By Chas. Boving, Its Agents.

PLAINTIFF'S EXHIBIT 111C

Ore Contract

This contract, made and entered into this twelfth day of August, Nineteen Hundred and Fifteen, by and between The Estate of Patrick Clark, First Party, hereinafter called the "Mining Company" and the United States Smelting Company, a corporation of Maine, Second Party, hereinafter called the "Smelting Company."

Witnesseth:

It is mutually agreed by and between the parties as follows:

(1) The mining Company agrees to ship and deliver to the Smelting Company, f. o. b. cars, at such zinc smelter in Kansas or Oklahoma [fol. 945] homa as the Smelting Company may designate, and the Smelting Company agrees to receive from and treat for the Mining Company its entire production of zinc ore and concentrates from the Galena Farms Mine at Slocam, British Columbia, up to five hundred (500) tons monthly (carrying over forty per cent [40%] metallic zinc) during the period of this agreement. The Mining Company shall commence the shipment of ore and concentrates October 1, 1915, and shall continue to deliver to said smelter sufficient ore and concentrates so that the Smelting Company may continue the treatment of same at the rate of approximately five hundred (500) tons per month during the period of this agreement. This agreement shall continue until January 1, 1917, unless sooner cancelled as hereinafter provided. It is agreed that should the Mining Company be unable to produce five hundred (500) tons of concentrates monthly during the life of this agreement that the failure of the Mining Company so to do shall not be considered a basis for damages against said Mining Company; it being understood, however, that the Mining Company shall use due diligence

and effort to produce and ship said tonnage to the Smelting Company.

(2) It is mutually agreed that the terms under which said product shall be treated shall be as follows:

The Smelting Company shall treat the product delivered to it hereunder, separately and without mixing, except with the consent of the Mining Company, by modern methods, with due diligence and skill, and use all reasonable efforts to obtain the highest possible [fol. 946] recovery; and shall market the spelter produced from the treatment of said product at the best price possible; it being understood that the Smelting Company shall use its discretion as to the time said spelter shall be sold and the price said spelter shall be sold for. It is agreed, however, unless otherwise mutually agreed to, that the Smelting Company shall sell the spelter so that final settlement may be made with the Mining Company, not later than sixty (60) days after receipt of the product at the Smelting Company's zinc smelting plant.

Should the average price received by the Smelting Company from the sale of the spelter produced from the product treated during the month be thirteen cents (\$.13) per pound or more, the basis of settlement shall be as follows:

From the amount received for the sale of said spelter, the Mining Company shall receive twenty dollars (\$20.00) per ton of concentrates, and the Smelting Company shall receive twenty dollars (\$20.00) per ton of concentrates; and the excess amount received from the sale of said spelter, over and above forty dollars (\$40.00) per ton of concentrates, shall be divided as follows:

60% to the Smelting Company.

40% to the Mining Company.

Should the average price received by the Smelting Company from the sale of the spelter produced from the ore and concentrates treated during the month be less than thirteen cents (\$.13) per pound, the Mining Company shall pay the Smelting Company for the treatment of said concentrates as follows:

[fol. 947] Twenty dollars (\$20.00) per wet ton based on a spelter price of five dollars (\$5.00) per hundred weight or less. For each cent received from the sale of said spelter above five dollars (\$5.00) per hundred weight, and up to eight dollars (\$8.00) per hundred weight, there shall be added to the treatment charge of twenty dollars (\$20.00) per ton, two and one-half cents (\$.02½). For each cent received from the sale of said spelter above eight dollars (\$8.00) per hundred weight and up to thirteen dollars (\$13.00) per hundred weight, there shall be added to the treatment charge, applying when spelter is eight dollars (\$8.00) per hundred weight, four and one-half cents (\$.04½).

Should the price realized for spelter for any month be less than seven cents (\$.07) per pound, the Mining Company shall have the privilege of cancelling this contract, provided the Smelting Com-

pany is unwilling to accept and pay for the product shipped hereunder, during such time as the price that can be realized from the sale of the spelter is below seven cents (\$.07) per pound, on the following basis:

Delivery.—F. o. b. smelter.

Payment.—\$27.00 per ton for product containing 50% metallic zinc when spelter is selling at St. Louis, according to the Engineering & Mining Journal, at \$5.00 per cwt.

For each per cent. zinc above 50% a credit of \$1.00 to be allowed.

For each per cent. zinc below 50% a debit of \$1.00 to be made.

For each cent rise in the price of zinc above \$5.00 per cwt., a credit of $4\frac{1}{2}\epsilon$ to be allowed.

[fol. 948] For each cent drop in the price of spelter below \$5.00 per cwt., a charge of $4\frac{1}{2}\epsilon$ to be made. The spelter price to govern to be that as quoted in the Engineering & Mining Journal for the E. & M. J. week previous to date of arrival at destination plant.

Lime.—1% allowed free; excess to be charged for at \$1.00 per unit.

The Smelting Company agrees to pay the freight and duty charges on the concentrates shipped under this agreement, which charges shall be considered as an advance payment to the Mining Company by the Smelting Company, and such amounts so advanced shall be deducted by the Smelting Company from the amount due the Mining Company as herein provided.

The Smelting Company shall deliver to the Mining Company f. o. b. railroad cars at its smelting plant where such ore and concentrates are treated, all residues resulting from the smelting of said zinc ore and concentrates. Deliveries of such residue shall be made f. o. b. cars as above provided, as soon as the Smelting Company shall have on hand one hundred (100) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of residue, the Smelting Company shall comply with such request, and in such event the Mining Company shall pay to the Smelting Company all extra costs incurred by the latter by reason thereof, but not exceeding 25¢ per ton.

The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to the records pertaining to the receipt, delivery, metallurgy and treatment of [fol. 949] said concentrates.

The Smelting Company shall, on or before the fifth day of each month, render to the Mining Company a statement of all concentrates treated hereunder during the preceding calendar month; and shall pay to the Mining Company, provided all spelter produced from the concentrates treated has been sold, such sum as shall be due the Mining Company under this agreement.

Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party because of fires, floods, strikes, riots, cyclones, wind storms, contingencies of transportation, financial

disturbances, or any other cause beyond the control of the party so prevented or delayed, whether stated herein in express terms or not, the party so prevented or delayed shall be excused from performing any of the covenants herein to be performed, while so prevented or delayed.

This contract shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns of both parties.

In witness whereof, we hereunto set our hands this twelfth day of August, Nineteen Hundred and Fifteen.

Estate of Patrick Clark, By J. J. Stewart, Subject to Approval of Mary A. Clark. United States Smelting Company, By ———. Witnessed: C. W. Geddes.

[fol. 950]

PLAINTIFF'S EXHIBIT 111D

Contract

This agreement, made and entered into this 2nd day of July, 1915, by and between The Bolivar Mining and Tunnel Transportation Company, of St. Joseph, Missouri, First Party, and hereinafter called "seller," and the United States Smelting Company, a corporation of Maine, Second Party, and hereinafter called "buyer."

It is hereby mutually agreed as follows: The seller agrees to ship and sell, and the buyer agrees to receive and buy the product hereinafter mentioned, upon the terms and conditions hereinafter set forth.

Product

The product covered by this contract is the output of sulphide, zinc ore and concentrates from the properties of the seller near Montezuma, Colorado. The buyer is not obligated to purchase any product containing less than 35% metallic zinc.

Period

This contract shall run for a period of six months commencing July 2nd, 1915, and ending January 2nd, 1916. It is agreed, however, that the buyer shall have the option of extending this contract an additional six months, providing notice is given to the seller in writing on or before the 30th day prior to the expiration of the above period. From date and up to September 15th, 1915, the buyer is not obligated to receive over an average of one hundred tons of product monthly. From September 15th, 1915, and up to January 2nd, 1916, the buyer is not obligated to receive over three hundred tons of product monthly. Should the seller produce [fol. 951] more product than the buyer is obligated to receive, the buyer shall have the option of receiving such excess tonnage. Should

the buyer not elect to receive such excess tonnage then the seller shall be free to dispose of same elsewhere.

Delivery

The product to be delivered by the seller f. o. b. cars at the buyer's smelting plant at Iola, Kansas.

Shipment to Other Smelting Works

The buyer has the privilege of smelting this ore at any zinc smelting plant. Should the buyer request the seller to consign the product to a smelting plant other than at Iola, Kansas, any excess or deficiency in freight charges shall be for the account of the buyer.

Sampling

To be sampled by the buyer free of charge.

Assaying

Each of the parties hereto will have assays made and compare same. Should they be within the following splitting limit, the average of the two assays shall govern in final settlement.

Splitting Limits: Zinc .5%

Should the assays not agree within the above splitting limit, a pulp sample shall be sent to one of the following umpire chemists, [fol. 952] each to be taken in rotation: Von Shults & Low, J. W. Richards, of Denver, Colorado, and the Union Assay Office, Salt Lake. Should the umpire's assay fall between the other two assays, then the umpire's assay shall govern. Should the umpire's assay fall outside the other two assays, then the assay nearest the umpire's assay shall govern. The party whose results are farthest from the umpire's assay shall pay the umpire's charges.

Payments

\$18.00 per ton for a product containing 40% metallic zinc when spelter is selling in St. Louis according to the Engineering & Mining Journal at \$5.00 per cwt. For each per cent. zinc above 40% a credit of \$1.50 will be allowed. For each per cent. zinc below 40% a charge of \$2.00 will be made. For each cent rise in the price of spelter above \$5.00 per cwt. and up to \$11.00 per cwt. a credit of 3 cts. will be allowed. No credit for the rise in the price of spelter above \$11.00 per cwt. For each cent drop in the price of spelter below \$5.00 per cwt. a charge of 5 cts. will be made. The price of spelter to govern in settlement shall be that as quoted in the Engineering & Mining Journal for the Engineering & Mining Journal's week of arrival at the destination plant.

Lime 1% allowed free. Excess to be charged for at \$1.00 per unit.

Delays from Strikes

This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any court, financial disturbances or any cause beyond the control of either party. If the seller is prevented or delayed by reason of any of the above causes, whether stated in express terms or otherwise, the seller shall be under no obligation to ship the product covered under this contract while so prevented or delayed. And the buyer, if prevented or delayed in receiving or treating any of the product covered by this contract, by reason of any of the above causes stated in express terms or otherwise, shall not be under any obligation to receive or treat such product while so prevented or delayed. This contract shall not be extended by reason of prevention or delay, but shall terminate January 2nd, 1916, unless extended as herein provided.

Succession

This contract shall be binding upon and inure to the benefit of the heirs, successors, assigns and administrators of both parties.

In witness whereof, we hereunto subscribe our hands this 16th day of July, 1915.

The Bolivar Mining & Tunnel Transportation Co., By T. G. Sortor, Sec. & Treas., First Party. United States Smelting Company, By W. H. Eardley, Second Party. Witness: F. E. Wuerth, E. L. Walsh. Approved: W. G. Sharp, President.

[fol. 954]

PLAINTIFF'S EXHIBIT 111E

Ore Contract

This contract, made and entered into this Tenth day of August, Nineteen hundred and fifteen, by and between the Victor Reduction Company, a corporation of California, First Party, hereinafter called the "Mining Company" and the United States Smelting Company, a corporation of Maine, Second Party, hereinafter called the "Smelting Company."

Witnesseth:

It is mutually agreed by and between the parties as follows:

(1) The Mining Company agrees to ship and deliver to the Smelting Company, f. o. b. cars, at such zinc smelter in Kansas as the Smelting Company may designate, and the Smelting Company agrees to receive from and treat for the Mining Company approximately three hundred (300) tons of zinc concentrates (carrying

over forty per cent. [40%] metallic zinc) monthly during the period of this agreement. This agreement shall cover concentrates shipped and delivered on or after August 20, 1915, and shall continue thereafter until August 20, 1917, unless sooner cancelled as hereinafter provided. The Mining Company shall have on hand at the smelter to be designated by the Smelting Company, sufficient concentrates so that the Smelting Company may, on September 15, 1915, commence the smelting of such concentrates; and the Mining Company shall continue to deliver to said smelter sufficient concentrates so that the Smelting Company may continue the treatment of same [fol. 955] at the rate of approximately three hundred (300) tons per month during the period of this agreement. It is agreed that should the Mining Company be unable to produce and ship three hundred (300) tons of concentrates monthly during the life of this agreement that, the failure of the Mining Company so to do shall not be considered a basis for damages against said Mining Company; it being understood however that the Mining Company shall use due diligence and effect to produce and ship said tonnage to the Smelting Company.

(2) It is mutually agreed that the terms under which said product shall be treated shall be as follows:

The Smelting Company shall treat the concentrates delivered to it hereunder, separately and without mixing, except with the consent of the Mining Company, by modern methods, with due diligence and skill, and use all reasonable efforts to obtain the highest possible recovery; and shall market the spelter produced from the treatment of said concentrates at the best price possible; it being understood that the Smelting Company shall use its discretion as to the time said spelter shall be sold and the price said spelter be sold for. It is agreed, however, unless otherwise mutually agreed to, that the Smelting Company shall sell the spelter so that final settlement may be made with the Mining Company, not later than sixty (60) days after receipt of the product at the Smelting Company's zinc smelting plant.

Should the average price received by the Smelting Company from the sale of the spelter produced from the concentrates treated during the month be thirteen cents (\$.13) per pound or more, the [fol. 956] basis of settlement shall be as follows:

From the amount received for the sale of said spelter, the Mining Company shall receive Twenty Dollars (\$20.00) per ton of concentrates, and the Smelting Company shall receive Twenty Dollars (\$20.00) per ton of concentrates; and the excess amount received from the sale of said spelter, over and above Forty Dollars (\$40.00) per ton of concentrates, shall be divided as follows:

Based on the concentrates treated during the month having an average zinc content of fifty per cent. (50%), the Smelting Company shall receive sixty per cent. (60%) of said excess and the Mining Company shall receive forty per cent. (40%) of said excess. For each per cent. zinc contained in the concentrates treated during the month above fifty per cent. (50%), the Mining Company shall

receive an additional one per cent. (1%) of such excess in addition to the forty per cent. (40%), up to a maximum of forty-five per cent. (45%) of said excess. For each per cent. zinc contained in the concentrates treated during the month less than fifty per cent. (50%), the Mining Company shall receive one per cent. (1%) less than the forty per cent. (40%) down to a minimum of thirty-five per cent. (35%) of said excess.

Should the average price received by the Smelting Company from the sale of the spelter produced from the concentrates treated during the month be less than thirteen cents (\$.13) per pound, the Mining Company shall pay the Smelting Company for the treatment of said concentrates as follows:

Twenty Dollars (\$20.00) per wet ton based on a spelter price of five dollars (\$5.00) per hundred weight or less. For each cent [fol. 957] received from the sale of said spelter about five dollars (\$5.00) per hundred weight, and up to eight dollars (\$8.00) per hundred weight, there shall be added to the treatment charge of twenty dollars (\$20.00) per ton, two and one-half cents (\$.02½). For each cent received from the sale of said spelter above eight dollars (\$8.00) per hundred weight and up to thirteen dollars (\$13.00) per hundred weight, there shall be added to the treatment charge, applying when spelter is eight dollars (\$8.00) per hundred weight, four and one-half cents (\$.04½).

The Smelting Company agrees to pay the freight charges on the concentrates shipped under this agreement, which charges shall be considered as an advance payment to the Mining Company by the Smelting Company, and such amounts so advanced shall be deducted from the Smelting Company's settlement with the Mining Company.

After product is sampled, the Smelting Company further agrees to pay the Mining Company as a further advance, on the amount that shall be due the Mining Company after said spelter is sold, the sum of Ten Dollars (\$10.00) per ton of concentrates, and such amounts so advanced to the Mining Company by the Smelting Company shall be deducted from the Smelting Company's final settlement with the Mining Company.

The Mining Company agrees to give the Smelting Company the option to receive and treat any excess tonnage produced by the Mining Company above three hundred tons (300) per month on the terms of this contract. Should the Smelting Company not elect to receive and treat such excess product on the terms specified herein, [fol. 958] then the Mining Company shall be free to dispose of such excess product elsewhere.

The Smelting Company shall deliver to the Mining Company f. o. b. railroad cars at its smelting plant where such concentrates are treated, all residues resulting from the smelting of said zinc concentrates. Deliveries of such residues shall be made f. o. b. cars as above provided, as soon as the Smelting Company shall have on hand one hundred (100) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of residue, the Smelting Company shall comply with such request

and in such event the Mining Company shall pay to the Smelting Company all extra costs incurred by the latter by reason thereof.

The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to the records pertaining to the receipt, delivery, metallurgy and treatment of said concentrates.

The Smelting Company shall, on or before the fifth day of each month, render to the Mining Company a statement of all concentrates treated hereunder during the preceding calendar month; and shall pay to the Mining Company, provided all spelter produced from the concentrates treated has been sold, such sum as shall be due the Mining Company under this agreement.

Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party because of fires, floods, strikes, riots, cyclones, wind storms, contingencies of transportation, financial disturbances, or any other cause beyond the control of the party so [fol. 959] prevented or delayed, whether stated herein in express terms or not, the party so prevented or delayed shall be excused from performing any of the covenants herein to be performed, while so prevented or delayed.

NOTE.—Should the price realized for spelter for any month be less than five and one-half cents (\$.05½) per pound and the Smelting Company is not willing to treat the product covered hereunder at Seventeen dollars and fifty cents (\$17.50) per ton during such time as the price that can be realized from the sale of spelter is below five and one-half cents (\$.05½) per pound, then and in that event, the Mining Company shall have option of cancelling this agreement.

In witness whereof we hereunto set our hands this eleventh day of August, Nineteen hundred and fifteen.

Victor Reduction Company, By B. M. Snyder, Manager.

Witnessed: F. F. Colcord. United States Smelting Company, By W. H. Eardley, Manager. Approved: W. G. Sharf, President.

[fol. 960]

Supplementary Agreement

Supplementary agreement to contract entered into the Tenth day of August, Nineteen hundred and fifteen, by and between the Victor Reduction Company, a corporation of California, First Party, hereinafter called the "Mining Company" and the United States Smelting Company, a corporation of Maine, Second Party, hereinafter called the "Smelting Company."

This contract shall be binding upon and inure to the benefit of the heirs, successors, administrators, and assigns of both parties.

Victor Reduction Company, By B. M. Snyder. Witnessed:

M. Duncan. United States Smelting Company, By W. H. Eardley. Approved: W. G. Sharf, President.

PLAINTIFF'S EXHIBIT 111F

Contract

This contract, made and entered into this 18th day of December, 1915, by and between the Pingrey Mines and Ore Reduction Company, First Party, and hereinafter called the seller, and the United States Smelting Company, Second Party, and hereinafter called the Buyer.

Witnesseth: It is mutually agreed between the parties hereto as follows: The seller agrees to ship and sell and the buyer agrees to receive and buy the product hereinafter mentioned upon the terms and conditions hereinafter set forth:

Product: The product covered by this contract is 300 tons of zinc sulphide ore or concentrates monthly, produced by the Pingrey Mines and Ore Reduction Company, at its properties near Leadville and Salida, Colorado. The buyer is not obligated to purchase under this contract product running less than 40% zinc or over 10% iron, with the following exception: One third of the tonnage shipped hereunder may run as high as 14% iron.

Period: This contract shall run for one year, beginning January first, 1916, and ending January first, 1917, unless extended as hereinafter provided. The buyer shall have the option of extending this contract an additional year, in six-month periods, by serving the seller notice in writing on or before the thirtieth day prior to the expiration of each six-month period. It is further agreed that should the Engineering & Mining Journal show the St. Louis price of spelter to be $7\frac{1}{2}\text{¢}$ per pound or less for any week at any time after July first, 1916, the buyer shall have the option of canceling this agreement by serving five days' written notice upon the seller.

Delivery: Product to be delivered F. O. B. the Buyer's works at Altoona, Kansas. The Buyer shall have the privilege of smelting this product at any smelting plant, and in the event of shipment to some other smelting plant other than at Altoona, Kansas, any excess or deficiency in freight charges shall be for the account of the buyer.

Sampling: Product to be sampled by the buyer free of charge. The seller shall have the privilege of having a representative present.

[fol. 962] **Assaying:** Each of the parties hereto will have assays made and compare same. Should they be within the following splitting limit, the average of the two assays shall govern in final settlement: Splitting Limits: Zinc .5%.

Should the assays not agree within the above splitting limit, a pulp sample shall be sent to one of the following umpire chemists, each to be taken in rotation: C. E. Richards and Von Shultz & Low, Denver, Colorado. Should the Umpire's assay fall between the other two assays, then the umpire's assay shall govern. Should the umpire's assay fall outside the other two assays, then the assay nearest the umpire's assay shall govern. The party whose results are farthest from the umpire's assay shall pay the umpire's charges.

Payments:

\$17.00 per ton for 40% product, when spelter is selling in St. Louis, according to the Engineering & Mining Journal at \$5.00 per cwt. For each per cent. zinc above 40% a credit of \$1.50 will be allowed. For each cent rise in the price of spelter above \$5.00 per cwt. and up to \$7.00 per cwt. a credit of 4¢ will be allowed. For each cent rise in the price of spelter above \$7.00 per cwt. and up to \$14.00 per cwt. a credit of 3¢ will be allowed. No credit allowed for any increase in the price of spelter above \$14.00 per cwt. For each cent drop in the price of spelter below \$5.00 per cwt. a charge of 5¢ will be made. The price of spelter to govern shall be that as quoted in the Engineering & Mining Journal for the week previous to date of receipt. Lime, 1% free; excess to be charged for at \$1.50 per unit.

[fol. 963] Delays from Strikes: This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any Court, financial disturbances or any causes beyond the control of either party. If the Seller is prevented or delayed by reason of any of the above cases, whether stated in express terms or otherwise, the seller shall be under no obligation to ship the product covered under this contract while so prevented or delayed. And the buyer, if prevented or delayed in receiving or treating any of the product covered by this contract, by reason of any of the above causes stated in express terms or otherwise, shall not be under any obligation to receive or treat such product while so prevented or delayed.

Succession: This contract shall be binding upon and inure to the benefit of the heirs, successors, assigns, and administrators of both parties.

In witness whereof, we hereunto subscribe our hands this 7th day of January, 1916.

Pingrey Mines & Ore Reduction Company, By O. A. King,
Mgr., First Party. Witness: R. W. King. United States
Smelting Company, By W. H. Eardley, Second Party.
Witness: W. Duncan. Approved: Frederick Lyon, Vice-
President.

One Dollar per ton to be paid to the Lanyon Zinc Company.

[fol. 964]

PLAINTIFF'S EXHIBIT 111G

Agreement

This agreement, made June 29th, 1915, by and between the United States Smelting Company, first party, a corporation of Maine, hereinafter called "Smelting Company," and the Big Four Exploration Company, second party, a corporation of Utah, hereinafter called the "Mining Company."

Witnesseth:

It is mutually agreed by and between the parties as follows:

(1) The Mining Company agrees to ship and deliver to the Smelting Company at such zinc smelter in Kansas, Missouri or Oklahoma, as the Smelting Company may designate, and the Smelting Company agrees to receive from, and treat for, the Mining Company approximately eight hundred (800) tons of zinc ores and concentrates monthly, during the period of this Agreement. This Agreement shall cover ores and concentrates to be shipped and delivered commencing September 1st, 1915, and continuing thereafter until September 1st, 1916. The Mining Company shall have on hand at the smelter to be designated by the Smelting Company, sufficient ores and concentrates so that the Smelting Company may on September 1st, 1915, commence the smelting of such ores and concentrates and the Mining Company shall continue to deliver to said smelter sufficient ores and concentrates so that the Smelting Company may continue the treatment of the same at the rate of eight hundred (800) tons per month during the period of time herein-[fol. 965] above provided for. The Smelting Company agrees to have bins prepared and ready for the receipt of ores and concentrates to be shipped and delivered hereunder not later than August 20th, 1915.

(2) The Mining Company shall pay to the Smelting Company a working charge for the smelting of such zinc ores and concentrates as shall be smelted by the Smelting Company hereunder as follows:

Sixteen Dollars and fifty cents (\$16.50) per dry ton of two thousand pounds avoirdupois when the price of spelter is $5\frac{3}{4}$ cents per pound or less. For each cent increase per pound in the price of spelter above $5\frac{3}{4}$ cents per pound, and up to and including ten cents (10¢) per pound, there shall be added to said working charge Two Dollars (\$2.00) per ton, fractions pro rata. For each cent increase in the price of spelter per pound above ten cents per pound, there shall be added to said working charge Three Dollars (\$3.00) per ton, fractions pro rata; provided however that upon all ores and concentrates treated hereunder between September 1, 1915 and January 1st, 1916, the minimum working charge to be paid the Smelting Company by the Mining Company, shall be Sixty Dollars (\$60.00) per ton.

(3) The working charges mentioned in the last preceding paragraph shall be based upon and determined by the actual sales and deliveries as made by the Mining Company, based on East St. Louis delivery, against spelter produced under this agreement, from all ores and concentrates treated under this agreement between September-[fol. 966] ber 1st, 1915 and January 1st, 1916. The Mining Company shall furnish the Smelting Company with true copies of contracts and memoranda of sales of spelter made or entered into by the Mining Company of the spelter last above mentioned and the

books of the Mining Company containing records of such sales and receipts thereon, as well as the original agreement or memoranda of sales, shall be open to inspection by the Smelting Company.

The working charges for all ores and concentrates treated under the terms of this agreement from and after January 1st, 1916, shall be based upon and determined by the average monthly East St. Louis price of prime Western spelter for the calendar month in which the product is treated as shown by the Engineering and Mining Journal quotations for such period.

(4) The Mining Company shall deliver all ores and concentrates to be treated hereunder f. o. b. railroad cars at the Smelting Company's plant; provided, however, that should the Smelting Company direct deliveries to any of its plants where the freight rate exceeds the freight rate to Altoona or La Harpe, Kansas, the Smelting Company shall pay such excess freight charges to the Mining Company.

If the Smelting Company desires to smelt any of said ores or concentrates at one of its plants not then being used for such purpose it shall notify the Mining Company where to make shipments and may also request diversions of shipments, in which event the Mining Company will comply with such request, but the Mining Company shall be excused for any delays in deliveries to such new plant except for negligence on the part of the Mining Company.

[fol. 967] (5) The Smelting Company shall treat all ores and concentrates delivered to it hereunder by modern methods with due diligence and skill and use all reasonable efforts to obtain the highest possible recovery and without mixing the same with any ores or concentrates. If the Mining Company shall believe that the recoveries made by the Smelting Company are not as good as they should be the Mining Company shall have the right to have its representative immediately make an investigation and the Smelting Company shall make any change in the treatment of such ores and concentrates as are requested by the Mining Company, provided such requested changes are in accordance with modern zinc smelting practice and do not require a radical remodeling of the plant.

(6) The Smelting Company shall deliver to the Mining Company f. o. b. railroad cars at its smelting plant where such ores and concentrates are treated, all spelter and the residue made from smelting the said zinc ores and concentrates between September 1st, 1915 and September 1st, 1916. Deliveries of such spelter and residue respectively shall be made f. o. b. cars as above provided as soon as the Smelting Company shall have on hand sufficient spelter to complete a carload shipment of spelter or shall have on hand two hundred (200) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of either spelter or residue, the Smelting Company shall comply with such request, and in such event the Mining Company shall pay to the Smelting Company all extra costs and expenses incurred by the latter by reason thereof.

[fol. 968] In the event the freight rate from the plant at which such ores or concentrates are treated, is in excess of the freight rates then in effect on spelter from La Harpe, Kansas to East St. Louis, Illinois, or from Altoona, Kansas to East St. Louis, Illinois, or on residue from La Harpe, or Altoona, Kansas, to the point where such residues are shipped, the Smelting Company shall pay such excess freight rate to the Mining Company.

(7) The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to operations and records pertaining to the receipt, delivery, metallurgy and treatment of said ores and concentrates.

(8) The Smelting Company shall, on or before the fifth day of each month during the continuance of this agreement, render to the Mining Company a statement of all ores and concentrates treated hereunder during the preceding calendar month, and the Mining Company shall, on or before the 20th day of the month in which such statement is rendered, pay to the Smelting Company at its office in Boston, Mass., such sum as shall be due the Smelting Company for the treatment of ores and concentrates covered by such statement.

(9) Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party, because of fires, floods, riots, strikes, cyclones, windstorms, contingencies of transportation or any other cause beyond the control of the party so prevented or delayed, whether stated herein in express terms or not, the party so prevented or delayed shall be excused from performing any such covenant while so prevented or delayed; but during any such disability on the part of the Smelting Company the Mining Company may dispose of any ores or concentrates not taken by the Smelting Company such privilege to continue, however, only until notified by the Smelting Company of the removal of the cause of disability.

(10) It is agreed that the Mining Company shall not be required to ship any ores or concentrates hereunder after January 1st, 1916, during any period in which the price of spelter remains below 5¾ cents per pound, but should the Mining Company discontinue shipments under this clause the Smelting Company shall have the option of cancelling this agreement or of extending the period in which this agreement is to run for a time equal to the time of such period of discontinuance, and the Smelting Company shall serve written notice of its election of the option hereby granted on the Mining Company within ten days after receiving notice in writing from the Mining Company of any discontinuance of shipments. The Mining Company shall only have the right to exercise the option granted to it under this paragraph during such time as the Mining Company while conducting its business with reasonable care, prudence and economy, is unable to ship except at a loss by reason of the price of spelter having declined below five and three quarters (5¾)

cents per pound and the books and operations of the Mining Company shall be open to inspection by the Smelting Company in order to enable the Smelting Company to determine whether the Mining [fol. 970] Company, if required to continue shipments, would while conducting its business operate at a loss.

(11) The provisions of this agreement shall inure to the benefit of and be binding upon, the parties hereto, their, and each of their successors and assigns.

In witness whereof the parties hereto have caused this instrument to be executed by their representatives thereunto duly authorized, the day and year first above written.

United States Smelting Company, By W. H. Eardley, Its Agent. Big Four Exploration Company, By Morris P. Kirk, Its President. Witness: H. R. MacMillan.

PLAINTIFF'S EXHIBIT 111H

This agreement, made this — day of November, 1915, by and between the United States Smelting Company, a corporation of Maine (hereinafter called the "Smelting Company"), party of the first part and Butte & Superior Copper Company, Limited, a corporation of Arizona (hereinafter called the "Mining Company"), party of the second part,

Witnesseth:

Whereas, the parties hereto did on the 21st day of June, 1915, and [fol. 971] the 28th day of June, 1915, respectively, enter into written agreements providing for the smelting of ores and concentrates to be produced by the Mining Company from its mines near Butte, Montana, which said contracts terminate on the first day of January, 1916; and

Whereas, the parties hereto desire to make further arrangements whereby the Smelting Company shall receive subsequent to January 1st, 1916, approximately, 3,000 tons of ores and concentrates from the Mining Company and to treat the same, all upon the terms and conditions hereinafter set forth;

Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, the parties have agreed and do hereby agree with each other as follows:

First. That all ores and concentrates shipped to the Smelting Company prior to January 1st, 1916, shall be apportioned between said contracts of June 21st, 1915 and June 28th, 1915, as follows:

Four-fifths to be considered as shipped under the contract of June 21st, 1915;

One-fifth under the contract of June 28th, 1915.

Second. The Mining Company shall ship and deliver to the Smelting Company at its zinc smelter at or near La Harpe, Kansas,

and the Smelting Company shall receive from and treat for the Mining Company from and after January 1st, 1916, 3,000 tons of zinc ores and concentrates at the rate of 600 tons during each calendar month beginning with January 1st, 1916; Provided, However, that [fol. 972] if said smelter cannot for any reason be operated at its full capacity at any time prior to the treatment of said 3,000 tons, at the rate of 600 tons per month, then the proportion of said ores and concentrates to be treated at said smelter for the Mining Company shall, during such period, be the proportion which 600 tons bears to the total capacity of said smelter.

Third. The Mining Company shall pay to the Smelting Company a working charge for the smelting of such ores and concentrates as follows:

A minimum working charge of \$36.25 per dry ton of 2,000 pounds avoirdupois when the price of spelter does not exceed 13.75 cents per pound. For each cent per pound increases in the price of spelter above 13.75 cents per pound shall be added \$3.00 per ton to said working charge up to but not exceeding a maximum charge of \$70 per ton; fractions pro rata.

Fourth. The working charge mentioned in the last preceding paragraph shall be based upon and determined by the actual sales and deliveries as made by the Mining Company based on East St. Louis delivery against spelter produced under this agreement. The Mining Company shall furnish the Smelting Company with true copies of contracts or memoranda of sales of smelter so made by the Mining Company and the books of the Mining Company containing record of such sales and receipts thereon, as well as the original agreements or memoranda of sales, shall be open to inspection by the Smelting Company.

Fifth. The Mining Company shall deliver such ores and concentrates [fol. 973] f. o. b. railroad cars at the Smelting Company said plant. The Smelting Company shall treat all ores and concentrates delivered to it hereunder by modern methods, with due diligence and skill, and without mixing with any other ores and concentrates. The Smelting Company guarantees an average monthly recovery of not less than 80% of the zinc contents of said ores and concentrates provided such zinc ores and concentrates do not average less than 50% metallic zinc. If the Mining Company shall believe that the recoveries made by the Smelting Company are not as good as they should be, the Mining Company shall have the right to have its representative immediately make an investigation and the Smelting Company shall make any changes in the treatment of such ores and concentrates as are requested by the Mining Company, provided such requested changes are in accordance with modern zinc smelting practice and do not require a radical remodeling of the plant.

Sixth. The Smelting Company shall deliver to the Mining Company f. o. b. railroad cars at its said smelting plant all spelter and the residue made from smelting said ores and concentrates. Deliv-

eries of such spelter and residue, respectively, shall be made f. o. b. cars, as above provided, as and whenever the Smelting Company shall have on hand sufficient spelter to complete a carload shipment or shall have on hand 200 tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery or shipment of either spelter or residue, the Smelting Company shall comply with such request and the Mining Company shall pay to the Smelting Company all extra costs and expenses incurred by the latter by reason thereof.

[fol. 974] Seventh. The Mining Company shall have the privilege of having a representative at the smelter who shall have access to operations and records pertaining to the receipt, delivery, assaying, sampling, metallurgy, and treatment of said ores and concentrates.

Eighth. The Smelting Company shall, on or before the fifth day of each month during the continuance of this agreement, render to the Mining Company a statement of all ores and concentrates treated hereunder during the preceding calendar month and the Mining Company shall, on or before the twentieth day of the month in which such statement is rendered, pay to the Smelting Company, at its office in Boston, Massachusetts, such sum as the parties hereto shall agree to be fair and reasonable pending the final settlement based on actual sales made by the Mining Company of said spelter, as hereinbefore provided, and final settlement and payment shall be made by the Mining Company as soon as practicable after the product for each month shall have been sold.

Ninth. Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party because of fires, floods, riots, strikes, cyclones, wind storms, contingencies of transportation or any other cause beyond the reasonable control of the party so prevented or delayed shall be excused from the performance of any such covenant while so prevented or delayed and during such disability the Mining Company may otherwise dispose of any ores or concentrates not taken and treated by the Smelting Company; such privilege to continue, however, only until notified by the Smelting [fol. 975] Company of the removal of the disability. Should the said smelting plant at La Harpe, Kansas, be destroyed, the Smelting Company shall be no longer obliged to receive any ores and concentrates hereunder.

Tenth. Any differences arising between the parties as to the interruption of this contract or any of its provisions shall be determined by arbitrators and in such event each party shall select an arbitrator to whom such dispute or difference shall be referred. In the event that the arbitrators thus selected do not agree they shall select a third arbitrator and the decision of the majority of such arbitrators shall govern.

The provisions of this agreement shall benefit and bind the respective successors and assigns of the parties hereto.

In witness whereof the parties hereto have caused their names to be hereunto subscribed by the hands of their respective Presidents, their corporate seals affixed and attested by their respective Secretaries and day and year first above written.

United States Smelting Company, By — — —, President.
Attest: — — —, Secretary. Butte and Superior Copper
Company, Limited, By — — —, President. Attest:
— — —, Secretary.

[fol. 976]

PLAINTIFF'S EXHIBIT 111I

Ore Contract

This contract, Made and entered into this Fourth Day of October, 1915, by and between F. J. Lyons, of the City of Meaderville, State of Montana, First Party, and hereinafter called the Seller, and the United States Smelting Company, a Corporation of Maine, Second Party, and hereinafter called Buyer:

Witnesseth:

It is mutually agreed by the parties hereto as follows:

The Seller agrees to ship and sell, and the Buyer agrees to receive and buy the product hereinafter mentioned upon the terms and conditions hereinafter set forth.

Product

Fifteen Hundred (1500) tons monthly of Crude Zinc Ore or Concentrates, assaying at least 40% metallic zinc, and containing not over ten (10) per cent. iron or two (2) per cent. lime, produced from the Ruthmont Mine, situated near Butte, Montana.

Should the Seller produce more than Fifteen Hundred (1500) tons monthly, the Buyer shall have the option of receiving the excess tonnage produced under the terms of this agreement.

Period

This contract shall run for a period of five (5) months, commencing November 1, 1915, and ending April 1, 1916. The Buyer, [fol. 977] however, shall have the option of extending this contract an additional three (3) months, or until July 1, 1916, providing notice is given to the Seller, in writing, on or before the fifteenth day prior to the expiration of the above period.

Delivery

Product to be delivered by the Seller F. O. B. cars, either Butte or Meaderville, Montana.

Sampling

To be sampled by the buyer free of charge.

Assaying

Each of the parties hereto will have assays made and compare same. Should they be within the following splitting limit, the average of the two assays shall govern in final settlement.

Splitting Limits: Zinc .5%

Should the assays not agree within the above splitting limit, a pulp sample shall be sent to one of the following umpire chemists, each to be taken in rotation: Union Assay Office, Crismon & Nichols, of Salt Lake City, Utah, and Lewis & Walker,—of Butte, Montana. Should the umpire's assay fall between the other two assays, then the umpire's assay shall govern. Should the umpire's assay fall outside the other two assays, then the assay nearest the umpire's assay shall govern. The party whose results are farthest from the umpire's assay shall pay the umpire's charges.

[fol. 978]

Payments

\$20.00 per dry ton of Two Thousand (2000) Pounds for a product containing forty (40) per cent metallic zinc. For each per cent. zinc above 40% a credit of \$1.00 will be allowed. The Buyer shall return to the Seller all moneys received for residues made from the product covered by this contract after deducting all costs for handling shipment of same. It is understood, however, that the Buyer shall have the privilege of mixing this product with any other ore or concentrates which the Buyer may treat at its Smelting Plants, and in the event of this product being mixed with other ores or concentrates in smelting, the Buyer shall return to the Seller its proportion of the moneys received for residues, if any, shipped from the products so mixed and smelted.

Delays from Strikes

This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any Court, financial disturbances or any cause beyond the control of either party. If the Seller is prevented or delayed by reason of any of the above causes, whether stated in express terms or otherwise, the Seller shall be under no obligation to ship the product covered under this contract while so prevented or delayed. And the Buyer, if prevented or delayed in receiving or treating any of the product covered by this contract, by reason of any of the above causes stated in express terms or otherwise, shall [fol. 979] not be under any obligation to receive or treat such product while so prevented or delayed.

Succession

This contract shall be binding upon and inure to the benefit of the heirs, successors, assigns and administrators of both parties.

In witness whereof, We hereunto subscribe our hands this 12th day of October, 1915.

F. J. Lyons, First Party. Witness: Adolph Keppler. United States Smelting Company, By W. H. Eardley, Second Party. M. Duncan. Approved: Frederick Lyon, Vice-President.

PLAINTIFF'S EXHIBIT 111J

Western Union

Kansas City, Mo., Jan. 15, 1916.

Poland Mining Co.,
Prescott, Arizona:

Will accept shipment basis named our letters October Thirteenth and November First.

W. H. Eardley. Paid charge U. S. Smelting Co.

[fol. 980]

Western Union

Prescott, Az., 12.01 p. 13.

W. H. Eardley:

United States Smelting Co.,
413 Republic Bldg.,
Kansas City, Mo.:

Your letters October Thirteenth and November First we regret exceedingly that letters were entirely misunderstood by us until we showed same today to Randolph Gemmill Company shippers to you who gave us results of your offer as outlined your letters which are satisfactory to us. Kindly wire if we may now make shipment on basis named your letters.

Poland Mining Co.

Poland Mining Co.,
Prescott, Ariz.

November 1st, 1915.

GENTLEMEN:

Referring further to our letter of October 13th, beg to advise that we will be willing to accept a shipment of concentrates on the basis [fol. 981] as outlined in the letter above referred to, except that the maximum spelter price will be 12¢ instead of 10¢. This would make \$6.00 per ton more than the price formerly quoted. This offer is for immediate acceptance. Kindly advise if shipment will be made.

Yours truly, — — —. WHE-RY.

Poland Mining Company

Prescott, Arizona, October 18, 1915.

United States Smelting Company,
413 Republic Building,
Kansas City, Mo.

DEAR SIRs:

This will acknowledge receipt and thank you for your letter of the thirteenth instant making offer for the small lot of zinc concentrates we have on hand, owned by leasers.

We are afraid the price you offer will not appeal to the parties who are interested in the concentrates, but will, however, take the matter up with them and probably write you again.

Thanking you, we are,

Yours very truly, Poland Mining Company, By Geo. D. Morris, Secretary.

[fol. 982]

Oct. 13, 1915.

Poland Mining Co.,
Prescott, Arizona.

GENTLEMEN:

We have your letter of the 9th inquiring as to whether or not we could handle a car of zinc concentrates which you have on hand. We would be willing to accept a shipment of concentrates running over 36% zinc on the following basis:

\$17.00 per ton for product running 40% zinc with spelter selling in St. Louis at \$5.00 per cwt. For each per cent. zinc above 40% a credit of \$1.00 will be allowed. For each per cent. zinc below 40% a charge of \$1.50 will be made. For each cent rise in the price of spelter above \$5.00 per cwt. and up to a maximum of \$10.00 per cwt. a credit of 3¢ will be allowed. The Engineering & Mining Journal price for the E. & M. J. week of arrival at the plant to govern.

In addition, we will pay for 50% of the gold value figured at \$19.00 per ounce, and for 50% of the silver value figured at the E. & M. J. price for date of arrival at the works, less a treatment charge in the gold and silver of \$4.00 per ton. If the 50% does not equal \$4.00 per ton, then there would be no treatment charge and only the zinc contents would be figured in the accounting. Shipment should be made to the U. S. Smelting Company, Iola, Kansas.

Kindly advise if we may expect shipment.

Yours very truly, — — — WHE. D.

[fol. 983]

Poland Mining Company

Prescott, Arizona, October 9, 1915.

The United States Smelting Company,
415 Republic Building,
Kansas City, Mo.

DEAR SIRs:

In reply to a letter we wrote your Needles plant regarding quotations on a car of lead ore we are today shipping your Midvale plant and making inquiry as to when they would be in a position to handle a lot of zinc concentrates we have on hand at our mill owned by some leasers, they write, in part, as follows:

"We are as yet unable to enter into negotiations for the purchase of zinc concentrates, but it is not impossible that the zinc plant recently acquired by one of our eastern companies, The United States Smelting Company, 415 Republic Bldg., Kansas City, is in a position to handle the small tonnage you have for shipment, and if you should care to communicate with them you might come to an agreement in regard to this matter."

We have on hand from twenty-five to thirty tons of zinc concentrates, running about \$12.00 in gold and silver, and from 36% to 40% in zinc. Will you kindly let us know what you could offer us for this product. We will, of course, be glad to send you a [fol. 984] sample of the concentrates.

Appreciating a favorable reply, we are,

Yours very truly, Poland Mining Company, By Geo. D. Morris, Secretary-Treasurer.

PLAINTIFF'S EXHIBIT 111K

Contract

This agreement, made and entered into this eighth day of September, 1915, by and between Silverton Mines, Limited, a corporation of England, First Party, hereinafter called the Mining Company, and the United States Smelting Company, a corporation of Maine, Second Party, hereinafter called the Smelting Company.

Witnesseth:

It is mutually agreed by and between the parties hereto as follows:

(1) The Mining Company agrees to ship and deliver to the Smelting Company, f. o. b. cars Iola, Kansas, subject to the conditions hereinafter specified, and the Smelting Company agrees to receive from and treat for the Mining Company. Subject to the terms and conditions hereinafter specified, the production of zinc ore and con-

concentrates from the properties of the Silverton Mines, Limited, at Silverton, British Columbia, up to three hundred (300) tons [fol. 985] monthly, during the period of this agreement.

This agreement shall commence September 1, 1915, and continue until September 1, 1917, unless sooner cancelled as hereinafter provided.

(2) It is agreed that should the Mining Company, after October 1, 1915, ship to the Smelting Company less than an average of two hundred (200) tons of ore and concentrates monthly, taken over a period of two (2) months, the Smelting Company shall have the option of canceling this agreement; but failure to exercise said option by serving a written notice on the Mining Company on or before the tenth of the succeeding calendar month shall operate as a waiver of the right to terminate because of failure to ship the required tonnage during the preceding two (2) months. This option of cancellation on the part of the Smelting Company shall continue from month to month.

It is further agreed that should the Smelting Company after October 1, 1915, fail to smelt at least two hundred (200) tons of such ore and concentrates monthly (provided at least this amount is received by the Smelting Company from the Mining Company) taken over a period of two (2) months, the Mining Company shall have the option of cancelling this agreement; but failure to exercise said option by serving a written notice on the Smelting Company, on or before the tenth of the succeeding calendar month, shall operate as a waiver of the right to terminate because of failure to ship the required tonnage during the preceding two (2) months. This option of cancellation on the part of the Mining Company shall continue from month to month.

[fol. 986] It is understood that this agreement on the part of the Smelting Company is based on the ability of the Smelting Company to treat the tonnage herein specified, after providing capacity for treating the sulphide ores and concentrates already contracted for, and to be shipped from the Company's own mines.

(3) It is mutually agreed that the terms under which said product shall be treated shall be as follows:

The Mining Company shall pay to the Smelting Company a working charge for the smelting of such zinc ores and concentrates as shall be smelted by the Smelting Company hereunder as follows:

Twenty dollars (\$20.00) per dry ton base on a spelter price of five dollars (\$5.00) per hundred weight or less. For each cent received from the sale of said spelter above five dollars (\$5.00) per hundred weight, and up to eight dollars (\$8.00) per hundred weight, there shall be added to the treatment charge of twenty dollars (\$20.00) per ton, two and one-half cents (\$.021½). For each cent received from the sale of said spelter above eight dollars (\$8.00) per hundred weight and up to thirteen dollars (\$13.00) per hundred weight, there shall be added to the treatment charge, applying when spelter is eight dollars (\$8.00) per hundred weight, four and one-half cents (\$.041½).

For each cent received from the sale of said spelter above thirteen dollars (\$13.00) per hundred weight, there shall be added to the treatment charge applying when spelter is thirteen dollars (\$13.00) per hundred weight, five and one-half (\$.05½) cents.

Should the price realized for spelter for any month be less than seven cent (\$.07) per pound, the Mining Company shall have the [fol. 987] privilege of cancelling this contract, provided the Smelting Company is unwilling to accept and pay for the product shipped hereunder, during such time as the price that can be realized from the sale of the spelter is below seven cents (\$.07) per pound, on the following basis:

Delivery: f. o. b. smelter.

Payment: \$27.00 per ton for product containing 50% metallic zinc when spelter is selling at St. Louis, according to the Engineering & Mining Journal, at \$5.00 per hundred weight. For each per cent. zinc above 50% a credit of \$1.00 to be allowed. For each per cent. zinc below 50% a debit of \$1.00 to be made. For each cent rise in the price of zinc above \$5.00 per hundred weight, a credit of 4½¢ to be allowed. For each cent drop in the price of spelter below \$5.00 per hundred weight, a charge of 4½¢ to be made. The spelter price to govern to be that as quoted in the Engineering & Mining Journal for the E. & M. J.'s week previous to the date of arrival at destination plant.

Lime: 1% allowed free; excess to be charged for at \$1.00 per unit.

Residues to be returned to the Mining Company as provided for hereinafter.

(4) The Smelting Company agrees to pay the freight and duty charges on the concentrates shipped under this agreement, which [fol. 988] charges shall be considered as an advance payment to the Mining Company by the Smelting Company, and such amounts so advanced shall be deducted by the Smelting Company from the amount due the Mining Company as herein provided.

(5) The Smelting Company shall deliver to the Mining Company f. o. b. railroad cars at its smelting plant where such ore and concentrates are treated, all residues resulting from the smelting of said zinc ore and concentrates. Deliveries of such residue shall be made f. o. b. cars as above provided as soon as the Smelting Company shall have on hand one hundred (100) tons of residue. Should the Mining Company request the Smelting Company to withhold any delivery of residue, the Smelting Company shall comply with such request and in such event the Mining Company shall pay to the Smelting Company all extra costs incurred by the latter by reason thereof, but not exceeding twenty-five cents (\$.25) per ton.

(6) The Mining Company shall have the privilege of having a representative located at the smelter, who shall have access to the records pertaining to the receipt, delivery, metallurgy and treatment of said concentrates.

(7) The Smelting Company shall, on or before the fifth day of each month, render to the Mining Company a statement of all concentrates treated hereunder during the preceding calendar month; and shall pay to the Mining Company, provided all spelter produced from the concentrates treated has been sold, such sum as shall be due the Mining Company under this agreement.

[fol. 989] (8) Should either party to this contract be prevented or delayed in the performance of any of the covenants herein agreed to be kept and performed by such party because of fires, floods, strikes, riots, cyclones, wind storms, contingencies of transportation, financial disturbances or any other cause beyond the control of the party so prevented or delayed, whether stated herein in express terms or not, the party so prevented or delayed, shall be excused from performing any of the covenants herein to be performed, while so prevented or delayed.

(9) This contract shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns of both parties.

In witness whereof, we hereunto set our hands this 8th day of September, Nineteen Hundred and Fifteen.

Silverton Mines, Limited, by M. S. Davis, Managing Director. Witnessed: G. Stilwell. United States Smelting Company, by B. W. H. Eardley. Witnessed: M. Duncan. Approved: W. G. Sharp, President. Approved G. W. Heintz, in his letter 11/23/15 to M. S. K.

Statement of Various Ores Bought on a Flat Price, Showing the Price of Spelter at Time of Purchase and the Smelter Margin as Compared with the Smelter Margin on Kennett Ores and at Contract Terms at the Same Price of Spelter

Date of Purchase	Car No.	Shipper	Zinc assay	Price paid per ton	Spelter price date of purchase	Estimated per cent. recovery	Smelter margin to cover smelting freight to East St. Louis & profit on		Est. % recovery on Kennett ore price & 40% Zn.	Smelter margin to cover smelting freight to East St. Louis & profit on	
							to cover smelting freight to East St. Louis & profit on	Kennett ore price & 40% Zn.		to cover smelting freight to East St. Louis & profit on	Kennett ore price & 40% Zn.
7/19/15	8833	Joplin Ore.	54.56	89.30	18.50	85	82.29	80	82.40		
7/21/15	251718	"	52.60	89.85	18.00	"	84.57	"	79.20		
7/21/15	251718	"	52.60	89.85	18.00	"	71.10	"	79.20		
7/22/15	22293	"	50.25	79.98	17.75	"	71.65	"	77.60		
7/26/15	10375	"	57.25	98.235	17.00	"	67.31	"	72.80		
7/26/15	20701	"	56.85	90.43	17.00	"	73.87	"	72.80		
7/29/15	20844	"	60.55	101.59	15.875	"	61.82	"	65.60		
7/31/15	11197	"	58.50	94.01	15.875	"	63.88	"	65.60		
8/10/15	2186	"	50.20	63.22	13.375	"	50.92	"	49.60		
8/11/15	20307	"	58.15	74.93	12.50	"	48.64	"	44.00		
8/23/15	19088	"	57.48	80.00	11.00	"	27.49	"	34.40		
11/22/15	10627	"	57.16	90.87	17.00	"	74.32	"	72.80		
11/27/15	30252	"	58.60	97.65	17.00	"	71.70	"	72.80		
Average.....					65.35	.....	66.67				
9/25/15	250 tons Con. Interstate Callahan Mng. Co.....	44%		40.00	13.375	80	54.16	80	49.60		
10/15/15	500 tons Con. Interstate Callahan Mng. Co.....	44%		40.00	12.375	"	47.12	"	43.20		
12/28/15	1875 tons Con. Interstate Callahan Mng. Co.....	48%		56.00	15.75	"	64.96	"	64.80		
1/24/16	Ship Cargo Spanish.....	40%		35.87	17.625	"	76.93	"	76.80		
11/26/15	Contract Dolph Gennell....	45%		48.00	17.00	"	74.40	"	72.80		
2/10/16	Contract Calumet Sonora	48%		60.00	17.75	"	76.32	"	77.60		

[fol. 991]

PLAINTIFF'S EXHIBIT 113A

Consolidated Interstate-Callahan Mining Co.

61 Broadway

New York

September 25th, 1915.

U. S. Smelting, Refining & Mining Co.,
Kansas City, Mo.

DEAR SIRS:

We beg to confirm having exchanged telegrams as per enclosed copy, and now take pleasure in confirming our sale to you of 250 tons of our flotation product at the following terms and conditions:

Price: \$40.00 per dry ton of ore, f. o. b. Iola, Kansas, basis 44% zinc. This price is a flat price, i.e., independent of the spelter market.

Unit variation: \$1.50 to be added or deducted for each unit of zinc above or below 44% fractions in proportion.

Weighing, sampling and assaying: Works' weights and samples to govern, we to have the right to be represented at these operations. Three samples to be made; one for you, one for the mine, and one to be held for umpire purposes.

Splitting limit: To be $\frac{1}{2}$ of 1% zinc. The umpire's determinations to govern in case they fall between your and our assays, and to be split with the party's nearest to the umpire in case your and our assays are higher or lower than the umpire's results.

[fol. 992] Control pulp is to be forwarded by you to the Consolidated Interstate-Callahan Mining Company, Wallace, Idaho. The mine will report their results to us, and we shall notify you when we are ready to exchange assays, and we will arrange that your and our assays be put in the mail at the same time, so that they may cross.

Payment: Cash upon agreement of assays.

We are pleased that we have come to business, and trust that this will be the beginning of mutually pleasant business relations between us.

Yours very truly, Consolidated Interstate-Callahan Mining Co., John H. Percival, President. Cc to Wallace.

Confirmation of Wires

From U. S. Smelting Co.:

September 24th.

Will take two hundred fifty tons flotation concentrates paying thirty-eight dollars per ton f. o. b. Iola Kansas for product running forty-four per cent zinc unit variation one dollar fifty cents advise.

[fol. 993] To U. S. Smelting Co.:

September 24th.

Wire received. Will ship to you provided you will raise your base price to forty-two dollars basis forty-four per cent zinc. Wire.

From U. S. Smelting Co.:

September 24th.

Will split difference with you and pay forty dollars per ton basis forty-four per cent kindly consign same to United States Smelting Company Iola Kansas sending bills of lading to this company Republic Building Kansas City assume shipments will commence at once.

To U. S. Smelting Co.:

September 25, 1915.

Night letter received. Accept your proposition two hundred fifty tons flotation product. Shipments will start promptly.

[fol. 994]

September 27, 1915.

Consolidated Interstate-Callahan Mining Co.,

61 Broadway,

New York City, N. Y.

GENTLEMEN:

We have your letter of the 25th, which states the agreement as we understand it, covering the purchase of 250 tons of flotation product.

Will you kindly advise if you have additional product to market, and if you would be willing to sell a definite tonnage per month on a sliding scale, which would give \$40.00 per ton for 44% zinc, based on a 13½¢ spelter market. In this event, it is quite likely that we can arrange to handle a regular tonnage of your product.

Yours very truly, ——— WHE. D.

Consolidated Interstate-Callahan Mining Co.

61 Broadway

New York

October 15, 1915.

United States Smelting, Refining & Mining Co.,

Kansas City, Missouri.

DEAR SIR:

We beg to confirm having exchanged telegrams as per enclosed copy, and now take pleasure in confirming our sale to you of 500 tons of our flotation product, at the following terms and conditions:

[fol. 995] Price: \$40.00 per dry ton of ore, f. o. b. Iola, Kansas, basis 44% zinc. This price is a flat price, i. e., independent of the spelter market.

Unit Variation: \$1.50 to be added or deducted for each unit of zinc above or below 44%, fractions in proportion.

Weighing, Sampling and Assaying: Works' weights and samples to govern, we to have the right to be represented at these operations. Three samples to be made; one for you, one for the mine, and one to be held for umpire purposes.

Splitting Limit: To be $\frac{1}{2}$ of 1% zinc. The umpire's determinations to govern in case they fall between your and our assays, and to be split with the party's nearest to the umpire in case your or our assays are higher or lower than the umpire's results.

Control pulp is to be forwarded by you to the Consolidated Interstate-Callahan Mining Company, Wallace, Idaho. The mine will report their results to us, and we shall notify you when we are ready to exchange assays, and we will arrange that your and our assays be put in the mill at the same time, so that they may cross.

Payment: Cash upon agreement of assays.

We are pleased that we have been able to make this additional sale to you.

Yours very truly, Consolidated Interstate-Callahan Mining Co. John H. Percival, President. CC to Wallace, Idaho.

[fol. 996]

October 18, 1915.

Consolidated Interstate-Callahan Mining Co.,
61 Broadway,
New York City, N. Y.

GENTLEMEN:

We have your letter of October 15th, confirming the sale to us of 500 tons of your product.

The terms are in accordance with our understanding.

Yours very truly, ———. WHE. D.

Consolidated Interstate-Callahan Mining Co.

61 Broadway

New York

December 28th, 1915.

United States Smelting Company,
Kansas City, Mo.

DEAR SIRs:

We beg to enclose herewith copies of telegrams exchanged with you, and now take pleasure in confirming our sale to you of eighteen hundred seventy-five (1,875) dry tons of our Zinc Ores (including table concentrates and flotation product) at the following terms and conditions:

[fol. 997] Price: Fifty-six dollars (\$56) per dry ton of ore, f. o. b. Iola, Kansas, basis 48% zinc. This price is a flat price, i. e., independent of the spelter market.

Unit Variation: \$1.75 to be added or deducted for each unit of zinc above or below 48%; fractions in proportion. In case any of the material should run below 45%, the unit variation below 45% is to be \$2 down to 40%, which shall be the minimum you are obliged to accept under this contract; fractions are to be figured in proportion.

Shipments: Shipment of the above 1,875 tons is to be made at the rate of 750 tons per month, beginning with January first.

We further confirm having sold you seven hundred fifty tons (750 tons) per month of our Zinc Ores (including table concentrates and flotation product) for a period of three and one-half ($3\frac{1}{2}$) months, commencing with the completion of the 1,875 tons above sold you at a flat price, at the following terms and conditions:

Price: Twenty-three dollars (\$23) f. o. b. Iola, Kansas, basis 45% zinc when spelter is quoted at St. Louis at \$5 per hundred pounds.

Unit Variation: \$1.75 is to be added for each unit of zinc above 45% zinc, fractions in proportion. When the zinc contents is below 45% \$2 per unit is to be deducted down to 40%, which shall be the minimum you are obliged to accept under this contract.

[fol. 998] **Price Variations:** For each \$1 advance per hundred pounds in the price of spelter above \$5 St. Louis, you are to pay us \$4 up to \$8 per hundred pounds St. Louis spelter. For each \$1 advance in the spelter market above \$8 per hundred pounds St. Louis you are to pay us \$3 up to a maximum spelter price of \$14.

The quotations to govern in settlement are to be the average quotations published in the Engineering & Mining Journal during the week of arrival.

Lime Penalty: For all lime contained in any of the ore shipped to you under the above contract, above $1\frac{1}{2}\%$, \$1.50 is to be deducted by you, fractions in proportion.

Weighing, Sampling, and Assaying: Works' weights and samples are to govern, we to have the right to be represented at these operations. Three samples are to be made; one for the smelter, one for the mine, and the third is to be held by the works for umpire purposes.

Splitting Limits: To be one-half of one per cent zinc and one-half of one per cent lime. In case the difference between your and the mine's assays is greater than $\frac{1}{2}$ of 1% the umpire samples are to be sent to J. W. Richards and Leonard & Root, both of Denver, in rotation. The umpire's results are to govern in case they fall between the smelter's and the mine's assays, and are to be split with the party nearest thereto in case the smelter's or the mine's assays are higher or lower than the umpire's results.

Payment: Cash upon agreement of assays.

[fol. 999] Kindly let us have your confirmation of the above transaction, and oblige,

Yours very truly, Consolidated Interstate-Callahan Mining Co. John H. Percival, President. (Seal.) Accepted:
United States Smelting Company, By W. H. Eardley.

Delays from Strikes: This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any court, financial disturb-

ances or any cause beyond the control of either party. If the seller is prevented or delayed by reason of any of the above causes, whether stated in express terms or otherwise, the seller shall be under no obligation to ship the product covered under this contract while so prevented or delayed. And the buyer if prevented or delayed in receiving or treating any of the product covered by this contract, by reason of any of the above causes stated in express terms or otherwise, shall not be under any obligation to receive or treat such product while so prevented or delayed.

Consolidated Interstate-Callahan Mining Co., By John H. Percival, President. United States Smelting Co., By W. H. Eardley. Approved: Frederick Lyon, Vice-President.

[fol. 1000]

PLAINTIFF'S EXHIBIT 113B

This agreement, made and entered into this twenty-fourth day of January, 1916, between W. Fletcher & Son, Limited, of 136 Fenchurch Street, London, England, party of the first part, and the United States Smelting Company, of Kansas City, U. S. A., party of the second part,

Witnesseth:

That for and in consideration of One Dollar and other valuable considerations, the party of the first part agrees to sell, and the party of the second part agrees to buy, a cargo of Zinc Blende ore, in quantity fifteen hundred (1500) to twenty-five hundred (2500) tons of 2,240 pounds each, to be shipped during January or February, 1916, seller's option.

The quality of the ore shall be such as will assay at least 38% metallic zinc, and otherwise conform as near as may be to the following analysis, with usual variations:

Lead Sulphide	4.80
Disulphide of Iron	11.74
Copper Oxide	0.12
Arsenic	0.06
Peroxide of Iron	10.76
Silica	7.52
Alumina	1.58
Protoxide of Manganese	0.21
Lime	1.46
Magnesia	1.38
Sulphuric Anhydride	1.48
Phosphoric Anhydride	0.11
Carbon Dioxide	3.34
[fol. 1001] Combined Water and Carbonaceous Matter....	3.51
Lead	4.16
Iron	13.01
Sulphur	24.52
Moisture .....	.19

The price to be \$33.00 per ton of 2,240 pounds based upon a metallic zinc content of 40%; dry weights and assays to govern. Should the assay run above 40%, \$1.25 per unit or fractions of a unit shall be thereto added. Should the assay run below 40%, then a deduction of \$1.25 per unit or fraction of a unit shall be made from this price.

The basis of this price is delivered to United States Port in bond, the buyer paying all duties levied by the United States Government.

Upon the arrival of the vessel at the ports of either New York, Chrome, Baltimore or Galveston, U. S. A., and as the ore cargo is discharged, or immediately after same is discharged, the product shall be sampled by parties mutually satisfactory, and pulp samples furnished to two of the following chemists at seller's option: Le Doux & Company, New York City; Dr. Lucius Pitkin, New York City; United States Metals Refining Company, Chrome, New Jersey; Pittsburgh Testing Laboratory, Pittsburgh, Pennsylvania. Should the results of the two assays show the product to be of the quality specified in this contract, the buyer shall pay to the seller 80% of the amount due, based on such assay results, and upon the weight as shown by the United States Custom House certificate at Port of Entry. (After making due allowance for weight of sacks and moisture.)

[fol. 1002] The final settlement shall be made after product has arrived at the smelter and has been sampled, moistured, assayed and weighed at the smelter under Government supervision; except that should the product go to Chrome, New Jersey, and be sampled, moistured and weighed under Government supervision by the United States Metals Refining Company, the results obtained on the samples taken at the plant of the United States Metals Refining Company and the dry weights as reported by them shall be taken in final settlement, and the total amount due for said product shall be paid by the buyer to the seller on the surrender of the bills of lading, consular invoices and other necessary papers.

This contract is contingent upon strikes, accidents, force majeure, etc., and it is further guaranteed by the buyer, and is made a part of this contract, that no spelter manufactured from the ore covered by this contract shall be exported, directly or indirectly, to any country other than to Great Britain or her Allies.

W. Fletcher & Son, Limited, By Errign, Director. Witness:
Ernest Breck, Clerk, 136 Lenchurch Street. E. C. United
States Smelting Company, By W. H. Eardley. Witness:
M. Duncan. Approved: Frederick Lyon, Vice-President.

[fol. 1003]

PLAINTIFF'S EXHIBIT 113C

Contract

This contract, made and entered into this 26th day of November, 1915, by and between the Randolph Gemmill Development Company, First Party, and hereinafter called the seller, and the United

States Smelting Company, Second Party, hereinafter called the Buyer.

Witnesseth:

It is mutually agreed between the parties hereto as follows:

The Seller agrees to ship and sell and the Buyer agrees to receive and buy the product hereinafter mentioned, upon the terms and conditions hereinafter set forth.

Product: The product covered by this contract is the output of zinc crude ore and concentrates from the properties of the Seller near Crown King, Arizona. The Buyer is not obligated to accept more than 200 tons of product monthly, but should the Seller produce more than 200 tons of product monthly, Buyer shall have the option of receiving same under the terms of this contract. The Buyer is not obligated to purchase under this contract product running less than 40% zinc or over 10% iron, but should the Seller produce product running under 40% zinc and over 10% iron, the Buyer has the option of receiving same under the terms of this contract.

Period: This contract shall run for seven months, beginning December 1, 1915, and ending July 1, 1916.

[fol. 1004] **Delivery:** Product to be delivered f. o. b. the Buyer's works at Altoona, Kansas.

Shipment to Other Smelting Works: The Buyer shall have the privilege of smelting this product at any smelting plant, and in the event of shipment to some other smelting plant other than at Altoona, Kansas, any excess or deficiency in freight charges shall be for the account of the Buyer.

Sampling: Product to be sampled by the Buyer free of charge. The Seller shall have the privilege of having a representative present.

Assaying: Each of the parties hereto will have assays made and compare same. Should they be within the following splitting limit, the average of the two assays shall govern in final settlement.

Splitting Limits: Zinc, .5%.

Should the assays not agree within the above splitting limit, a pulp sample shall be sent to one of the following umpire chemists, each to be taken in rotation: Union Assay Office, Salt Lake City, Utah; J. W. Richards, Denver, Colorado. Should the umpire's assay fall between the other two assays, then the umpire's assay shall govern. Should the umpire's assay fall outside the other two assays, then the assay nearest the umpire's assay shall govern. The party whose results are farthest from the umpire's assay shall pay the umpire's charges.

Payments: \$48.00 per ton for product running 45% metallic zinc. [fol. 1005] For each per cent. above 45% a credit of \$1.50 will be allowed. For each per cent. below 45% a debit of \$1.50 will be made. Lime, 1% allowed free, excess to be charged for at \$1.50 per unit.

The residues produced from the treatment of the product covered by this contract shall be shipped by the Buyer under the agreements which the Buyer has for the shipment and sale of such product, and

shall pay to the Seller the total amount received for said residues, less the actual cost of handling said residues at the Buyer's works. It is understood, however, that the cost of handling shall not exceed 25¢ per ton.

It is further agreed that the Buyer shall have the privilege of smelting this product with other ores or concentrates, and in the event that such product is treated by mixing with other product, the amount returnable to the Seller by the Buyer for the residues produced shall be proportionate to the metal contents of the ores constituting the mixture.

Delays from Strikes: This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any court, financial disturbances or any causes beyond the control of either party. If the Seller is prevented or delayed by reason of any of the above causes, whether stated in express terms or otherwise, the Seller shall be under no obligation to ship the product covered under this contract while so prevented or delayed. And the Buyer, if prevented or delayed in receiving or treating any of the product covered by this contract, by reason of any of the above causes stated in express terms [fol. 1006] or otherwise, shall not be under any obligations to receive or treat such product while so prevented or delayed.

Succession: This contract shall be binding upon and inure to the benefit of the heirs, successors, assigns and administrators of both parties.

In witness whereof, we hereunto subscribe our hands this 30th day of November, 1915.

Randolph Gemmill Development Company, By M. P. Randolph, Prest., First Party. Witness: David B. Gemmill.
United States Smelting Company, By ———, Second Party.

PLAINTIFF'S EXHIBIT 113D

Ore Contract

Kansas City, Missouri.

This contract, made and entered into this 17th day of February, 1916, by and between Carnegie Lead & Zinc Company, First Party, and hereinafter called the Seller, and United States Smelting Company, a corporation of Maine, Second Party, and hereinafter called the Buyer.

[fol. 1007] Witnesseth:

It is mutually agreed by the parties hereto as follows:

The Seller agrees to sell and deliver, and the Buyer agrees to buy and accept the product hereinafter mentioned, upon the terms and conditions hereinafter set forth.

Product: The product covered by this contract is the entire output (subject to exceptions herein noted) of crude zinc ore or zinc concentrates, herein called product, shipped from the properties of the Seller Cananea, Mexico, to wit:

There shall be excepted from this agreement all product running under 38% zinc, or containing over 10% iron, or over 4% lime; but should the Seller produce and ship such product, the Buyer shall have the option of accepting same under the terms of this agreement. Should the Buyer not elect to accept such products under the terms of this agreement then the Seller shall be free to dispose of same elsewhere.

The Buyer is not obligated to accept over 400 tons of product monthly. Should the Seller produce more product than the Buyer is obligated to purchase, the Buyer shall have the option of accepting same under the terms of this contract. Should the Buyer not elect to accept such excess tonnage under the terms of this contract, then the Seller shall be free to dispose of such excess tonnage elsewhere.

Period: This contract shall run for a period of 10½ months, [fol. 1008] commencing February 15, 1916, and ending January 1, 1917. Either party shall have the right of cancelling contract if spelter drops below \$10.00 per cwt.

Delivery: Product to be delivered by the Seller free on board cars at Iola or La Harpe, Kansas.

Smelting at Other Works: The Buyer shall have the privilege of smelting, or having this product smelted at any smelting plant. In the event product is smelted at any point other than Iola or La-Harpe, Kansas, any excess or deficiency in freight charges shall be for the account of the Buyer.

Sampling: To be sampled by the Buyer, free of charge. Seller shall have the privilege of having a representative present at the time product is sampled, if desired.

Assaying: Each of the parties hereto shall have assays made at their own expense and compare same. Should they be within the following splitting limit, the average of the two assays shall govern in final settlement.

Splitting Limit: Zinc .5%.

Should the assays not agree within the above splitting limit, a pulp sample shall be sent to one of the following umpire chemists, each to be taken in rotation: J. W. Richards, Denver, Colorado, Oscar J. Frost, Denver. Should the umpire's assay fall between the other two assays, then the umpire's assay shall govern. Should the [fol. 1009] umpire's assay fall outside the other two assays, then the assay nearest the umpire's assay shall govern. The party whose results are farthest from the umpire's assay shall pay the umpire's charges.

Payments: Anything to the contrary notwithstanding, it is hereby agreed that no payment shall be made for metals contained other than the zinc unless payment for other metals is specifically provided herein.

\$60.00 per ton for product containing 48% zinc when spelter, according to the Engineering and Mining Journal, is selling in St.

Louis at \$13.00 per cwt. For each per cent. zinc above 48%, a credit of \$2.00 per ton will be allowed. For each per cent. zinc below 48%, a charge of \$2.00 per ton will be made. For each cent drop in the price of spelter below \$13.00 per cwt. and down to \$10.00 per cwt. a charge of 5¢ per ton will be made. For each cent drop in the price of spelter below \$10.00 per cwt. a charge of 4¢ per ton will be made. No credit allowed for the increase in the spelter price above \$13.00 per cwt. with the exception noted below. The price of spelter to govern shall be that quoted in the Engineering and Mining Journal for St. Louis delivery for the Engineer and Mining Journal's week of arrival at smelter station.

Lime, 1½% allowed free; excess to be charged for at \$1.00 per unit.

Exception: Should the Buyer's actual average sales price for Prime Western Spelter for any month exceed \$18.00 per cwt., the Seller shall be allowed a credit of 3¢ per ton for each cent rise in the actual [fol. 1010] average sales price above \$18.00 per cwt. for the product received under this contract during such month.

Settlements: Cash on agreement of assays.

Delays from Strikes: This contract shall be subject to strikes, riots, floods, fires, wind storms, cyclones, contingencies of transportation, the order, judgment or decree of any court, financial disturbances or any cause beyond the control of either party. If the Seller is prevented or delayed by reason of any of the above causes, whether stated in express terms or otherwise, the Seller shall be under no obligation to deliver the product covered under this contract while so prevented or delayed. And the Buyer, if prevented or delayed in accepting or smelting any of the product covered by this contract, by reason of any of the above causes stated in express terms or otherwise, shall not be under any obligation to accept or smelt such product while so prevented or delayed.

Arbitration: Should any difference arise between the parties hereto as to the interpretation of this agreement, such differences shall be settled by arbitration. Each of the parties hereto shall select one arbitrator, and these two arbitrators shall select a third arbitrator, and the decision of the majority shall be binding upon both parties.

Succession: This contract shall be binding upon and inure to the benefit of the heirs, successors, assigns or administrators of both parties.

[fol. 1011] In witness whereof, we hereunto subscribe our hands this 17th day of February, 1916.

Carnegie Lead & Zinc Company, By B. B. Burgure, Prest.,
First Party. Witness M. Duncan. United States Smelting
Company, By W. H. Eardley, Manager, Second Party.
Witness: M. Duncan. Approved C. E. Rio, Vice-President.

[fol. 1012]

PLAINTIFF'S EXHIBIT 115

Prices Paid by the United States Zinc Company According to Deposition of Edwin Anderson and Their Comparison with Price Paid the Mammoth Copper Mining Company by the United States Smelting Co.

	Price rec'd on 14c. spelter market for 40% zn	Mammoth price on 14c. market, 40% zn
July, 1915—Daly West M. Co., Park City, Utah:		
\$23.00 for 40% Zn @ 5.50 spelter and carrying 19 oz. Ag and 5.5% wet lead Unit Var. Zn \$1.00 Ag 40¢ Pb 20¢ Price Var. 50% of Zn from \$5.50 to 8.00 Max	\$33.00	\$36.00
March, 1915—Pingrey Mines & Ore Reduction Co.:		
\$10.00 for 33% Zn @ 5.00 Sp. and carrying .05 oz. Au, 7 oz. Ag, 10% wet lead. Unit Var. Zn 80¢, Ag 40, Pb 20¢. Price Var. 50% from \$5.00 to \$8.00 Max.	27.60	36.00
Aug. 1915—W. J. Chamberlain Ore Sampling Co.:		
\$16.50 for 40% Zn @ \$5.00 Sp. and carrying .05 oz. Au, 10 oz. Ag. 6.5% wet lead. Maximum paid due to increase of spelter price \$16.00	32.50	36.00
[fol. 1013] July 1, 1915—The Amalgamated Pioche:		
\$16.00 for 40% Zn @ \$5.00 Sp. and carrying .10 Au, 10 oz. Ag. Price Var. 65% \$5.00 to \$6.00; 50% \$6.00 to \$7.00; 30% \$7.00 to \$8.00 Max	27.60	36.00
Sept. 4, 1915—Caldo Mining Co:		
\$26.50 for 40% Zn @ \$6.00 Sp. and carrying 20 oz. Ag and 8% wet lead. Price Var. 70% \$6.00 to \$7.00; 50% \$7.00 to \$8.00; 30% \$8.00 to \$9.75 Max.	40.30	36.00
June 30, 1915—Federal Mining & Smelting Co.:		
\$26.85 for 45% Zn @ \$6.00 Sp. and carrying 10 oz. Ag and 7% wet lead. Price Var. 50% \$6.00 to \$7.00; 30% \$7.00 to \$9.75 Max. Unit Var. Zn \$1.00, Ag. 40¢, Pb 30¢	32.45	36.00

Price rec'd on 14c. spelter market for 40% zn	Mammoth price on 14c. market, 40% zn
---	--

July, 1915—Green Hill & Cleveland M.
Co.:

Same as Federal	32.45	36.00
Denver City Mine-Gunnison Colo. quoted \$30.00 for 40% zinc regardless of spelter price	30.00	36.00
Sept. 20, 1915, party at Sandon, British Colum- bia quoted \$40.00 for 50% Zn. regardless of price	30.00	36.00

NOTE—The prices shown above as those paid by the United States Zinc Company include the payment for gold, silver and lead as well as zinc, while those showing price paid for Mammoth ore represents payment for zinc only.

[fol. 1014]

PLAINTIFF EXHIBIT 118

United States Smelting Co.

Kansas City, Mo., Sept. 29, 1915.

To Mammoth Copper Mining Company of Maine,
Kennett, California:

We credit your account this day as follows:

Oct. 4, 1915.

In payment for the following cars of ore:

(Needles Concentrates)

Car	Lot	
47070	868/61-A-B	\$585.00
33968	867/50-A	455.22
24528	866/58-A	511.43
43082	862/59-A	538.68
126546	861/57-A	550.82
		<u>\$2,641.15</u>

Correct and Entered. ———. Approved: U. B. A., Cashier.
Approved: W. H. E., Manager.

	Debits	Credits
Base		\$.....
Base assay.....	%	
Settlement assay.....	%	
	<hr/>	
Variation	% @	
Base price.....		\$.....
Spelter price.....		
	<hr/>	
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$	\$.....
	<hr/>	
Net price per ton		\$.....
70,530 lbs. @ \$7.40 per ton.....		\$864.70
Advances	\$	
37,7975 T. Freight @ \$7.40 per ton		279.70
Sampling		
Assaying		
Demurrage		
Final Payment.....	585.00	\$.....
	<hr/>	
	\$864.70	\$864.70

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
Variation		
Base price	% @	\$.....
Spelter price		
Variation		
Penalties	@	
Residues net payment per ton		
Totals		\$.....
Net price per ton		
62,139 lbs. @ 22.92 per ton		
Advances		\$.....
34,715 T. Freight @ \$7.40 per ton		\$712.11
Sampling	256.89	
Assaying		
Demurrage		
Final Payment	455.22	\$.....
	\$712.11	\$712.11

[Vol. 1017]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 29, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Needles Concentrates. Lot No. 866/58-A. Class —.

Shipped 8-5-15. Received 8-11-15. Sampled —, —, —. Spelter \$13.47916.

	Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
G. T. 24528.....		65,632	....	65,632	5.8%	61,825
Totals

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	34.2	....	.....	....	...	....	....	....	...	....
Shipper .....	....	....	....	....	...	....	....	....	...	....
Umpire .....	....	....	....	....	...	....	....	....	...	....
Settlement Assay.....	34.2	....	.....	....	...	....	....	....	...	....

	Debits	Credits
Base		\$.....
Base assay.....		
Settlement assay.....		
	%	
	%	
Variation	% @	
Base price.....		
Spelter price.....		
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
61,825 lbs. @ \$24.40 per ton		\$754.27
Advances	\$.....	
32,816 T. Freight @\$7.40 per ton	242.84	
Sampling		
Assaying		
Demurrage		
Final Payment.....	51.43	\$.....
	\$754.27	\$754.27

[fol. 1018]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 29, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Needles Concentrates. Lot No. 862-59-A. Class —.

Shipped 8-6-15. Received 8-16-15. Sampled —, —, —. Spelter \$10.70833.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
C., B. Q. 43082.....	71,810	....	71,810	10.1%	64,557
Totals .....	.....	....	.....	....	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	34.9	....	.....	.....	....	.....	....	....	...	....
Shipper .....	.....	....	.....	.....	....	.....	....	....	...	....
Umpire .....	.....	....	.....	.....	....	.....	....	....	...	....
Settlement Assay.....	34.9	....	.....	.....	....	.....	....	....	...	....

	Debits	Credits
Base		\$.....
Base assay		
Settlement assay	%	
	%	
Variation		
Base price	% @	\$.....
Spelter price		
Variation		
Penalties	@	
Residues net payment per ton.		
Totals	\$	\$.....
Net price per ton		\$.....
64,557 lbs. @ \$24.92 per ton		\$804.38
Advances	\$	
35,905 T. Freight @ \$7.40 per ton	265.70	
Sampling		
Assaying		
Demurrage		
Final Payment	538.68	\$.....
	<u>\$804.38</u>	<u>\$804.38</u>

	Debits	Credits
Base		\$.....
Base assay.....	%	
Settlement assay.....	%	
	<hr/>	
Variation	% @	
Base price.....		
Spelter price.....		
	<hr/>	
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
67,174 lbs. @ \$24.40 per ton		\$819.52
Advances	\$.....	
36,105 T. Freight @ \$7.40 per ton	268.70	
Sampling		
Assaying		
Demurrage	550.82	
Final Payment.....		\$.....
	<hr/>	
	\$819.52	\$819.52

[fol. 1020]

United States Smelting Co.

Kansas City, Mo., Sept. 29, 1915.

To Mammoth Copper Mining Company of Maine,
Kennett, Calif.:

Oct. 4, 1915.

We credit your account this day as follows:

In payment for following cars of ore:

Car	Lot		
54376	749/27	.....	\$1,383.09
54585	750/28	.....	1,244.75
10725	751/29	.....	1,386.34
54205	753/31	.....	1,395.92
3237	755/33	.....	1,401.23
52790	758/36	.....	1,196.73
12671	851/39	.....	1,139.99
53333	731/26	.....	1,176.88

 \$10,324.93

Correct and entered. A. M. A. Approved: U. B. A., Cashier.
 Approved: W. H. E., Manager.

United States Smelting Co.

Republic Building

Kansas City, Mo., September 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 749/277. Class —.

Shipped 7-27-15. Received 8-10-15. Sampled ———, ———. Spelter \$13.47916.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 54376.....	107,721	....	107,721	1.0%	106,643
Totals .....	.....	....	.....	..	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	40.7	....	.....	....	....	....	....	....	...	....
Shipper	40.8	....	.....	....	....	....	....	....	...	....
Empire .....	....	....	.....	....	....	....	....	....	...	....
Settlement Assay.....	40.7	....	.....	....	....	....	....	....	...	....

Assays—Continued

		Debits	Credits
Base			\$.....
Base assay	%		
Settlement assay	%		
Variation	% @	\$.....	
Base price			
Spelter price			
Variation	@		
Penalties			
Residues net payment per ton.			
Totals		\$.....	\$.....
			\$1,975.56
Net price per ton			
106,643 lbs. @ \$37.05 per ton			
Advances		\$.....	
53,8605 Tons Freight @ \$11.00 per ton		592.47	
Sampling			
Assaying			
Demurrage			
Final Payment		1,383.09	\$.....
		\$1,975.56	\$1,975.56

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 750/28. Class —.

Shipped 7-27-15. Received 8-11-15. Sampled —, —, —. Spelter \$13.47916.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 54585.....	109,864	....	109,864	1.0%	108,765
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	39.0	....	.....	....	...	....	....	....	...	....
Shipper	39.1	....	.....	....	...	....	....	....	...	....
Umpire .....	....	....	.....	....	...	....	....	....	...	....
Settlement Assay.....	39.0	....	.....	....	...	....	....	....	...	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
Variation	% @	\$.....
Base price		
Spelter price		
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
108,765 lbs. @ \$34.00 per ton		\$1,849.00
Advances	\$.....	
54,932 T. Freight @ \$11.00 per ton	604.25	
Sampling		
Assaying		
Demurrage	1,244.75	
Final Payment		\$.....
	<u>\$1,849.00</u>	<u>\$1,849.00</u>

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 751/29. Class —.

Shipped 7-27-15. Received 8-10-15. Sampled — — —, Spelter \$13.47916.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 10725.....	104,939	....	104,939	1.0%	103,889
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	41.2	....	.....	....	...	....	....	....	...	....
Shipper	40.6	....	.....	....	...	....	....	....	...	....
Umpire .....	....	....	.....	....	...	....	....	....	...	....
Settlement Assay.....	41.2	....	.....	....	...	....	....	....	...	....

765

Assays—Continued

	Debits	Credits
Base		\$
Base assay .....	.....
Settlement assay .....	.....
	%	
	%	
Variation .....	.....	\$ .....
Base price .....	.....
Spelter price .....	.....
	% @	
Variation .....	.....
Penalties .....	.....
Residues net payment per ton.	.....
Totals	\$	\$
Net price per ton		\$
103,889 lbs. @ \$37.80 per ton		\$1,963.50
Advances	\$	
52,4695 T. Freight @ \$11.00 per ton	577.16	
Sampling		
Assaying		
Demurrage		
Final Payment	1,386.34	\$
	\$1,963.50	\$1,963.50

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 753/31. Class —.

Shipped 7-28-15. Received 8-10-15. Sampled — — —. Spelter \$13,479.16.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 54205.....	102,776	....	102,776	1.0%	101,748
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	41.7	....	.....	....	...	....	....	....	...	....
Shipper	41.6	....	.....	....	....	....	....	....	...	....
Empire .....	....	....	.....	....	....	....	....	....	...	....
Settlement Assay.....	41.7	....	.....	....	....	....	....	....	...	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
Variation	% @	\$.....
Base price		
Spelter price		
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
101,748 lbs. @ \$38.55 per ton		\$1,961.19
Advances	\$.....	
51.383 T. Freight @ \$11.00 per ton	565.27	
Sampling		
Assaying		
Demurrage		
Final Payment	\$1,395.92	\$.....
	\$1,961.19	\$1,961.19

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 755/33. Class —.

Shipped 7-28-15. Received 8-10-15. Sampled —, —, —. Spelter \$13.47916.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
II. T. C. 3237.....	110,410	....	110,410	1.0%	109,305
Totals .....	....	....	....	....	....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	40.5	....	....	....	....	....	....	....	....	....
Shipper	40.0	....	....	....	....	....	....	....	....	....
Umpire .....	....	....	....	....	....	....	....	....	....	....
Settlement Assay	40.5	....	....	....	....	....	....	....	....	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay%	
Settlement assay%	
Variation	\$.....	
Base price%	
Spelter price .....	.....
Variation	@	
Penalties .....	.....
Residues net payment per ton.	.....
Totals	\$.....	\$.....
Net price per ton		\$.....
109,305 lbs. @ \$36.75 per ton		\$2,008.48
Advances	\$.....	
55,205 T. Freight @ \$11.00 per ton	607.25	
Sampling		
Assaying		
Demurrage		
Final Payment	\$1,401.23	\$.....
	\$2,008.48	\$2,008.48

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 758/36. Class —.

Shipped 7-29-15. Received 8-12-15. Sampled — — —. Spelter \$10.70833.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 42790.....	110,352	....	110,352	1.3%	108,917
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	39.0	.....	.....	....	....	.....	....	....	....	....
Shipper	38.6	.....	.....	....	....	.....	....	....	....	....
Umpire .....	....	.....	.....	....	....	.....	....	....	....	....
Settlement Assay	39.0	.....	.....	....	....	.....	....	....	....	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay.....%	
Settlement assay.....%	
Variation@.....	
Base price.....%	
Spelter price.....	.....
Variation@.....	
Penalties .....	.....
Residues net payment per ton.	.....
Totals	\$.....	\$.....
Net price per ton		\$.....
108,917 lbs. @ \$33.12 per ton		\$1,803.67
Advances		
55.176 T. Freight @ \$11.00 per ton	\$.....	
Sampling	606.94	
Assaying		
Demurrage		
Final Payment.....	\$1,196.73	\$.....
	\$1,803.67	\$1,803.67

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 851/39. Class —.

Shipped 8-3-15. Received 8-16-15. Sampled —, —, —. Spelter \$10.70833.

Car numbers	Wet weight	Sacks	Net weight	Molsture	Dry weight
S. P. 12671.....	85,269	....	85,269	1.0%	84,416
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	42.0	....	.....	....	....	....	....	....	..	....
Shipper	41.8	....	.....	....	....	....	....	....	..	....
Umpire .....	....	....	.....	....	....	....	....	....	..	....
Settlement Assay.....	42.0	....	.....	....	....	....	....	....	..	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay.....	%	
Settlement assay.....	%	
Variation	% @	
Base price.....		\$.....
Spelter price.....		
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
85,269 lbs. @ \$38.12 per ton		\$1,608.97
Advances	\$.....	
42,6345 T. Freight @ \$11.00 per ton	468.98	
Sampling		
Assaying		
Demurrage		
Final Payment.....	\$1,139.99	\$.....
	\$1,608.97	\$1,608.97

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 731/26. Class —.

Shipped 7-25-15. Received 8-10-15. Sampled —, —, —. Spelter \$13.47916.

Car numbers	Wet weight	Sacks	Net weight	Molsture	Dry weight
S. P. 53335	105,940	...	105,940	2.3%	103,503
Totals .....	.....	.....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.	39.0	....	....	....	....	....	....	....	....	....
Shipper	39.5	....	....	....	....	....	....	....	....	....
Umpire .....	....	....	....	....	....	....	....	....	....	....
Settlement Assay	39.0	....	....	....	....	....	....	....	....	....

Assays—Continued

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
	<hr/>	
Variation	% @	
Base price		
Spelter price		
	<hr/>	
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
103,503 lbs. @ \$34.00 per ton		\$1,759.55
Advances	\$.....	
52.97 T. Freight @ \$11.00 per ton	582.67	
Sampling		
Assaying		
Demurrage		
Final Payment	\$1,176.88	\$.....
	<hr/>	
	\$1,759.55	\$1,759.55

[fol. 1029]

United States Smelting Co.

Kansas City, Mo., Sept. 29, 1915.

To Mammoth Copper Mining Company of Maine,
Kennett, Calif.:

Oct. 4, 1915.

We credit your account this day as follows:

In payment for following lots of ore:

Car	Lot	Amount
277686	885/45	\$1,103.52
4028	896/50	1,137.39
54387	912/54	1,440.50
54352	914/56	1,235.87
53173	929/58	1,324.85
53359	930/59	1,371.83
53363	931/60	1,491.49
		<hr/>
		\$9,105.45

Correct and entered. ———. Approved: U. B. A., Cashier.
 Approved: W. H. E., Manager.

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
	<hr/>	
Variation	% @	\$.....
Base price		
Spelter price		
	<hr/>	
Variation	@	
Penalties		
Residues net payment per ton.		\$.....
Totals		\$.....
		\$1,545.55
Net price per ton		
79,565 lbs. @ \$38.85 per ton		\$.....
Advances	442.03	
40,1845 T. Freight @ \$11.00 per ton		
Sampling		
Assaying		
Demurrage	\$1,103.52	
Final Payment		\$.....
	<hr/>	
	\$1,545.55	\$1,545.55

[fol. 1031]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 896/50. Class —.

Shipped 8-11-15. Received 8-31-15. Sampled —, —, —. Spelter \$14.4583.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
E. J. E. 4028	81,512	....	81,512	1.0%	80,697
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.	42.2	....	.....	....	...	....	....	....	...	....
Shipper	41.7	....	.....	....	...	....	....	....	...	....
Umpire .....	....	....	.....	....	...	....	....	....	...	....
Settlement Assay	42.2	....	.....	....	...	....	....	....	...	....

	Debits	Credits
Base		\$.....
Base assay.....		
Settlement assay.....		
	%	
	%	

Variation	% @.....	
Base price.....		
Spelter price.....		

Variation	@.....	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
80,697 lbs. @ \$39.30 per ton ..		\$1,585.70
Advances		
40,756 T. Freight @ \$11.00 per ton ..	448.31	
Sampling		
Assaying		
Demurrage	\$1,137.39	
Final Payment.....		
	\$1,585.70	\$1,585.70

[vol. 1032]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 912/54. Class —.

Shipped 8-15-15. Received 9-15-15. Sampled — — —. Spelter \$14.4583.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 54387.....	95,593	....	95,593	1.0%	94,647
Totals .....	.....	....	.....	..	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	43.7	....	.....	....	..	....	....	....	..	....
Shipper .....	....	....	.....	....	..	....	....	....	..	....
Umpire .....	....	....	.....	....	..	....	....	....	..	....
Settlement Assay.....	43.7	....	.....	....	..	....	....	....	..	....

	Debits	Credits
Base		\$.....
Base assay	%	
Settlement assay	%	
	<hr/>	
Variation	% @	
Base price		\$.....
Spelter price		
	<hr/>	
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
94,647 lbs. @ \$41.55 per ton		\$1,966.29
Advances	\$.....	
47,7965 T. Freight @ \$11.00 per ton	525.79	
Sampling		
Assaying		
Demurrage		
Final Payment	\$1,440.50	P.....
	<hr/>	
	\$1,966.29	\$1,966.29

	Debits	Credits
Base		\$.....
Base assay.....	%	
Settlement assay.....	%	
Variation	% @	\$.....
Base price.....		
Spelter price.....		
Variation	@	
Penalties		
Residues net payment per ton.		
Totals	\$.....	\$.....
Net price per ton		\$.....
95,971 lbs. @ \$36.90 per ton		\$1,770.66
Advances	\$.....	
48,6175 T. Freight @ \$11.00 per ton	534.79	
Sampling		
Assaying		
Demurrage	\$1,235.87	
Final Payment.....		\$.....
	\$1,770.66	\$1,770.66

[fol. 1034]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 929/58. Class —.

Shipped 8-18-15. Received 9-3-15. Sampled —, —, —. Spelter \$13.65.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 53173.....	88,804	....	88,804	1.0%	87,916
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	43.5	....	.....	....	...	....	....	....	...	....
Shipper	39.2	....	.....	....	...	....	....	....	...	....
Umpire .....	....	....	.....	....	...	....	....	....	...	....
Settlement Assay.....	43.5	....	.....	....	...	....	....	....	...	....

	Debits	Credits
Base .....	.....	\$.....
Base assay	%	
Settlement assay	%	
	<hr/>	
Variation	% @	\$.....
Base price .....	.....
Spelter price .....	.....
	<hr/>	
Variation .....	@ .....	.....
Penalties .....	.....	.....
Residues net payment per ton.	.....	.....
Totals	\$.....	\$.....
Net price per ton .....	.....	\$1,813.27
87,916 lbs. @ \$41.25 per ton	\$.....	
Advances	488.42	
44,402 T. Freight @ \$11.00 per ton .....	.....
Sampling .....	.....
Assaying .....	.....
Demurrage	\$1,324.85	
Final Payment	<hr/>	<hr/>
	\$1,813.27	\$1,813.27

[fol. 1035]

United States Smelting Co.

Republic Building

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 930/59. Class —.

Shipped 8-18-15. Received 9-3-15. Sampled —, —, —. Spelter \$13.65.

Car numbers	Wet weight	Sacks	Net weight	Moisture	Dry weight
S. P. 53359.....	108,092	....	108,092	1.0%	107,011
Totals .....	.....	....	.....	...	.....

Oct. 4, 1915.

Assays

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.....	40.5	....	.....	....	...	....	....	....	...	....
Shipper	42.4	....	.....	....	...	....	....	....	...	....
Umpire .....	....	....	.....	....	...	....	....	....	...	....
Settlement Assay.....	40.5	....	.....	....	...	....	....	....	...	....

	Debits	Credits
Base .....	.....	\$.....
Base assay.....	%	
Settlement assay.....	%	
Variation	% @	\$.....
Base price.....	.....
Spelter price.....	.....
Variation .....	@ .....	.....
Penalties .....	.....	.....
Residues net payment per ton.	.....	\$.....
Totals .....	.....	\$.....
Net price per ton .....	.....	\$.....
107,011 lbs. @ \$36.75 per ton	\$.....	\$1,966.33
Advances .....	.....
54,046 T. Freight @ \$11.00 per ton	594.50	
Sampling .....	.....
Assaying .....	.....
Demurrage	\$1,371.83	\$.....
Final Payment.....	\$1,966.33	\$1,966.33

Kansas City, Mo., Sept. 28, 1915.

Pay to Mammoth Copper Mining Company of Maine

Ore Sulphide. Lot No. 931/60. Class —.

Shipped 8-19-15. Received 9-2-15. Sampled —, —. Spelter \$13.65.

Oct. 4, 1915.

	Zinc	Iron	Manganese	Lime	Lead	Sulphur	Silica	Silver	Gold	Copper
U. S. S. Co.	42.5
Shipper	41.5
Empire
Settlement Assay	42.5

	Debits	Credits
Base		\$.....
Base assay		
Settlement assay	%	
	%	
Variation		
Base price	% @	\$.....
Spelter price		
Variation		
Penalties	@	
Residues net payment per ton		
Totals		\$.....
Net price per ton		\$.....
104,158 lbs. @ \$39.75 per ton		\$2,070.14
Advances		
52,605 Tons Freight @ \$11.00 per ton	\$	
Sampling	578.65	
Assaying		
Demurrage		
Final Payment	\$1,491.49	\$.....
	\$2,070.14	\$2,070.14

[fol. 1037]

Clearing Account Voucher

No. J6851.

October 4, 1915.

U. S. Smelting Company, Dr., to Mammoth Copper Mining Company

Description

For purchase of Ore Lots, as follows:

Credit Memo. dated Sept. 29, 1915.....	\$9,105.45
" " " " " "	10,324.93
" " " " " "	2,651.15
	<hr/>
	\$22,071.53

Cr.—U. S. Smelting Co., Zinc Department.

Oct. 5, 1915.

Received by clearance from U. S. Smelting Company, the sum of Twenty Two Thousand Seventy One and 53/100 Dollars in full settlement of above account.

\$22,071.53.

Mammoth Copper Mining Company of Maine. A. Garel,
Assistant Treasurer. Examined: W. A. K. Checked:
G. C. Entered: G. C. Audited: C. F. W. Approval:
J. Lavine, Comptroller.

[On reverse side:] Clearing Account Voucher No. J6851. U. S. Smelting Company. Distribution. Mammoth Copper Mining Co., 22,071.53.

There were thirty-one vouchers similar in character to this exhibit, to which were attached similar settlement sheets totalling the sum of \$331,638.96

[fol. 1038]

PLAINTIFF'S EXHIBIT 127

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION CONCERNING ACTION IN STATE OF UTAH AND NEW YORK SUPREME COURT

It is hereby stipulated, for the purpose of this trial only, between the attorneys for the respective parties hereto, as follows:

I. Heretofore on or about the 29th day of June, 1916, the Mammoth Copper Mining Company caused to be served on Herbert Salinger, Salt Lake City, Utah, a copy of the summons and complaint

in the form annexed hereto and made a part hereof, marked schedule [fol. 1039] "A." Thereafter said Salinger forwarded the said copy of the summons and complaint so served on him or a true copy thereof to Benno Elkan and Otto Frohnknecht at 61 Broadway, New York City, which was received by them on or about the 10th day of July, 1916. Thereafter the service upon Salinger was set aside and the Action dismissed by the Court in which the same was brought upon the ground that Salinger was not the General Agent of the corporation Beer, Sondheimer & Co., Inc., the defendant therein.

II. Heretofore on or about the 29th day of September, 1916, at 61 Broadway, the plaintiff in this action caused to be served on said Benno Elkan and Otto Frohnknecht above named at 61 Broadway, City of New York, a copy of a summons and complaint in the form annexed hereto and made a part hereof, marked schedule "B," in an action in the Supreme Court of the State of New York for the County of New York; and on October 19, 1916, said Benno Elkan and Otto Frohnknecht duly appeared in said action in the New York Supreme Court for New York County by their attorneys Messrs. Sullivan & Cromwell, and demanded that a copy of the complaint be served upon said attorneys. On or about the 29th day of September, 1916, the plaintiff in this action caused to be served on Beer, Sondheimer & Co., Inc., a corporation organized under the laws of New York, at said 61 Broadway, New York City, a copy of said summons and said complaint (schedule "B") in an action in the Supreme Court of the State of New York for the County of New York by leaving a copy of said summons and complaint with one Harry [fol. 1040] Falck, treasurer of said Beer, Sondheimer & Co., Inc., and thereafter on October 29th, 1916, said Beer, Sondheimer & Co., Inc., duly appeared in said action in the New York Supreme Court for New York County by their attorneys Messrs. Sullivan & Cromwell, and demanded that a copy of the complaint be served upon said attorneys. The plaintiff caused a warrant of attachment to be issued in said action and served upon said Beer, Sondheimer & Co., Inc., levying upon any property of Nathan Sondheimer, Albert Sondheimer, Leo Werchner, Ludwig Beer and Emil Beer, constituting the partnership of Beer, Sondheimer & Co., and thereafter said Beer, Sondheimer & Co., Inc., certified to the sheriff of New York County that it had no property of any of the members of said partnership of Beer, Sondheimer & Co., in its possession. An order was obtained for service by publication upon said Nathan Sondheimer, Albert Sondheimer, Leo Werchner, Ludwig Beer and Emil Beer, constituting the partnership of Beer, Sondheimer & Co., but thereafter on or about 23rd of April, 1917, said order was vacated and set aside. No personal service was ever obtained upon said Nathan Sondheimer, Albert Sondheimer, Leo Werchner, Ludwig Beer and Emil Beer, and they did not appear in said action.

III. While conceding, solely for the purpose of this trial, the truth of the facts hereinabove stated, the defendants Francis P. Garvan as Alien Property Custodian, and John Burke as Treasurer of the United States of America, object to the consideration of said

[fol. 1041] facts by the Master or the Court on the ground that the same are irrelevant and immaterial.

Dated, New York, March 9, 1921.

Charles W. Stockton, Attorney for Plaintiff. Francis G. Caffey, Attorney for Defendants Francis P. Garvan, as Alien Property Custodian, and John Burke, as Treasurer of the United States of America, By Harland B. Tibbetts, of Counsel.

"SCHEDULE A" TO EXHIBIT 127

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

MAMMOTH COPPER MINING COMPANY OF MAINE, a Corporation,
Plaintiff,
against

BEER, SONDSHEIMER & COMPANY, INC., a Corporation, Defendant

Complaint for Damages for Breach of Contract

Plaintiff herein complains of defendant above named and for cause of action alleges:

[fol. 1042] I. That at all the times hereinafter mentioned plaintiff was, and now is, a corporation organized and existing under the laws of the State of Maine, and that at all of said times had, and now has, a certain mine and properties in the County of Shasta, State of California at which the plaintiff at all of said times produced, and now produces, zinc ores, and from which the plaintiff at all of said times shipped, and now ships, zinc ores.

II. That at all the times hereinafter mentioned defendant was, and now is, a corporation organized and existing under the laws of the State of New York, and that one of the purposes for which the defendant is formed is to buy zinc ores.

III. That on or about the 29th day of September, 1914, in the City of Salt Lake, said County of Salt Lake, the plaintiff and the defendant entered into a certain contract in writing, dated August 26th, 1914, wherein and whereby the plaintiff contracted to sell and deliver to the defendant, at the smelting works of the defendant at Bartlesville, in the State of Oklahoma, or at such other works as the defendant might designate, and the defendant contracted to purchase and receive from the plaintiff at said Bartlesville, or at such other works as it might designate, all of the zinc crude ore, running not less than thirty-three (33) per cent. metallic zinc, which the plaintiff produced at and shipped from its said mine and properties [fol. 1043] between the said 29th day of September, 1914, and the

26th day of February, 1916, and for which said zinc crude ore the defendant agreed to pay the prices stated in said contract.

IV. That between said 29th day of September, 1914, and said 26th day of February, 1916, the plaintiff produced and shipped from its said mine and properties ten thousand nine hundred and seventy-four and three hundred and thirteen thousandths (10,974.313) tons of said zinc crude ore, running not less than thirty-three (33) per cent. metallic zinc, and that the defendant, pursuant to the terms of said contract dated August 26, 1914, received from the plaintiff, at the said smelting works of the defendant at said Bartlesville, and paid the plaintiff, at the prices stated in said contract, the sum of Thirty thousand nine hundred and ninety-seven and 80/100 Dollars (\$30,997.80) for one thousand four hundred and forty-eight and three hundred and eighty-two thousandths (1,448.382) tons of said zinc crude ore; that the plaintiff offered to deliver the remaining nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of said zinc crude ore; to the defendant at its said smelting works at said Bartlesville, or at such other works as the defendant might designate, but that the defendant has refused to receive the said nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of said zinc crude ore, or any part thereof, at its said smelting works at said Bartlesville, or at all, though requested to do so by the plaintiff.

[fol. 1044] V. That the plaintiff sold said nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore for the best obtainable prices, to wit, for the sum of Two hundred and thirty-eight thousand two hundred and seventy-eight and 76/100 Dollars (\$238,278.76), and that the amount which would have been paid to the plaintiff by the defendant for said nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore at the prices agreed to be paid by the defendant to the plaintiff under said contract dated August 26th 1914, was the sum of Five hundred and eleven thousand one hundred and three and 64/100 Dollars (\$511,103.64) and that the said total amount so received by the plaintiff for said nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore is Two hundred and seventy-two thousand eight hundred and twenty-four and 88/100 Dollars (\$272,824.88) less than the amount which the defendant, in and by said contract dated August 26th, 1914, agreed to pay the plaintiff for said nine thousand five hundred and twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore.

VI. That the interest on said sum of Two hundred and seventy-two thousand eight hundred and twenty-four and 88/100 Dollars (\$272,824.88) to the 22nd day of May, 1916, at the rate of eight (8) per cent. per annum, amounts to the sum of Fifteen thousand

[fol. 1045] five hundred and twenty-three and 59/100 Dollars (\$15,523.59).

VII. That by reason of the premises plaintiff has been damaged in the sum of Two hundred and seventy-two thousand eight hundred and twenty-four and 88/100 Dollars (\$272,824.88) with interest thereon amounting on the 22nd day of May, 1916, to the sum of Fifteen thousand five hundred and twenty-three and 59/100 Dollars (\$15,523.59).

Wherefore, the plaintiff prays for judgment against the defendant for the sum of Two hundred and seventy-two thousand eight hundred and twenty-four and 88/100 Dollars (\$272,824.88), with interest thereon to the 22nd day of May, 1916, amounting to the sum of Fifteen thousand five hundred and twenty-three and 59/100 Dollars (\$15,523.59), and with interest on said sum of Two hundred and seventy-two thousand eight hundred and twenty-four and 88/100 Dollars (\$272,824.88) from the 22nd day of May, 1916, at the rate of eight (8) per cent. per annum to the date of rendition of judgment herein, and for its costs of suit.

— — —, Attorney for Plaintiff. — — —, of Counsel.

[fol. 1046] Affidavit of G. W. Metcalf to Schedule A omitted in printing.

[fol. 1047] "SCHEDULE B" TO EXHIBIT 127

NEW YORK SUPREME COURT, COUNTY OF NEW YORK

FREDERICK Y. ROBERTSON, Plaintiff,

against

BEER, SONDHEIMER & COMPANY, INC., a Domestic Corporation, and Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, Emile Beer, Benno Elkan, Otto Frohnknecht, Peter First, John Second, Richard Third, Henry Fourth and James Fifth, Partners, Doing Business under the Firm Name and Style of Beer, Sondheimer & Company, the said Names "Peter First," "John Second," "Richard Third," "Henry Fourth," and "James Fifth," Being Fictitious, the true Names of said Defendants Being Unknown to Plaintiff, Defendants.

Summons

Trial Desired in New York County

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within [fol. 1048] (20) days after the service of this summons, exclusive

of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, September 27, 1916.

Charles W. Stockton, Plaintiff's Attorney, Office and P. O.
Address 51 Broadway, Borough of Manhattan, New York
City.

[fol. 1049] Schedule "A" annexed to this complaint is a contract dated August 26th, 1914, and Plaintiff's Exhibit I.

NEW YORK SUPREME COURT, COUNTY OF NEW YORK

FREDERICK Y. ROBERTSON, Plaintiff,

against

BEER, SONDHEIMER & COMPANY, INC., a Domestic Corporation, and Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer, Emile Beer, Benno Elkan, Otto Frohnknecht, Peter First, John Second, Richard Third, Henry Fourth, and James Fifth, Partners, Doing Business under the Firm Name and Style of Beer, Sondheimer & Company, the said Names "Peter First," "John Second," "Richard Third," "Henry Fourth," and "James Fifth," Being Fictitious, the True Names of said Defendants Being Unknown to Plaintiff, Defendants.

Complaint

The plaintiff herein, by Charles W. Stockton, his attorney, complains of the defendants above-named and alleges:

[fol. 1050] I. That at all the times hereinafter mentioned plaintiff was and now is a resident of the State of New York.

II. Upon information and belief, that at all the times hereinafter mentioned the Mammoth Copper Mining Company of Maine was and now is a corporation organized and existing under the laws of the State of Maine.

III. Upon information and belief, that all the times hereinafter mentioned since on or about the 25th day of August, 1915, the defendant Beer, Sondheimer & Company, Inc., was and now is a corporation organized and existing under the laws of the State of New York.

IV. Upon information and belief, that the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer are and at all times hereinafter mentioned were co-partners doing business under the firm name and style of Beer, Sond-

heimer & Company and that the home office of said firm is Frankfort-on-the-Main, Germany.

V. That the plaintiff is ignorant of the true names of those defendants herein named and sued as "Peter First," "John Second," "Richard Third," "Henry Fourth" and "James Fifth," and for that reason plaintiff has designated said defendants by said names which are fictitious, and alleges upon information and belief that the defendants above named in this paragraph and Benno Elkan and Otto Frohnknecht are and at all times herein mentioned were [fol. 1051] partners in said firm and together with the individual defendants mentioned in paragraph IV constituted and constitute all of the members of said firm.

VI. Upon information and belief, that at all the times hereinafter mentioned the Mammoth Copper Mining Company of Maine had and operated and now has and operates a certain mine and properties in the County of Shasta, State of California, and there at all said times produced and now produces zinc ores and at all said times shipped and now ships zinc ores therefrom.

VII. Upon information and belief, that on or about the 29th day of September, 1914, the Mammoth Copper Mining Company of Maine and the said defendant copartnership firm, Beer, Sondheimer & Company, entered into a certain contract in writing subscribed by said Mammoth Copper Mining Company of Maine, and by said Beer, Sondheimer & Company, dated August 26, 1914, copy of which contract is annexed hereto and made a part hereof, marked "Schedule A."

VIII. That by the terms of said contract the Mammoth Copper Mining Company of Maine contracted to sell and deliver to the defendant Beer, Sondheimer & Company at the smelting works of said defendant at Bartlesville in the State of Oklahoma, or at such other works as the said defendant might designate, and the said defendant contracted to purchase and receive from the Mammoth Copper Mining Company of Maine, all of the zinc crude ore, running not less than thirty-three (33%) per cent. metallic zinc, which the Mammoth Copper Mining Company of Maine produced at and [fol. 1052] shipped from its said mine and property between the said 29th day of September, 1914, and a date being one year after the date of first shipment made after the completion of the picking plant which the Mammoth Copper Mining Company of Maine contemplated building. That the building of the picking plant was completed and the first shipment thereafter made on February 26th, 1915.

IX. Upon information and belief, that between said 29th day of September, 1914, and the 26th day of February, 1916, the Mammoth Copper Mining Company of Maine produced and shipped from its said mine and properties ten thousand nine hundred seventy-four and three hundred and thirteen thousandths (10,974.313) tons of said zinc crude ore, none of which ran less than thirty-three

(33%) pre cent. metallic zinc, and that the said defendant copartnership firm, Beer, Sondheimer & Company, accepted and received from the Mammoth Copper Mining Company of Maine one thousand four hundred forty-eight and three hundred and eighty-two thousandths (1,448.382) tons of said zinc crude ore and paid therefor at the prices stated in said contract the sum of Thirty thousand nine hundred ninety-seven and eighty-one hundredths (\$30,997.80) Dollars.

X. Upon information and belief, that the Mammoth Copper Mining Company of Maine offered to deliver the remaining nine thousand five hundred twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of said zinc crude ore to the defendant Beer, Sondheimer & Company at its said smelting works at Bartles-[fol. 1053] ville, Oklahoma, or at such other works as the said defendant might designate, but that the said defendant refused to receive the said nine thousand five hundred twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of said crude ore or any part and refused to pay for the same or any part of it or to perform its said agreement in any respect further than performed as hereinbefore alleged, although the Mammoth Copper Mining Company of Maine duly tendered said nine thousand five hundred twenty-five and nine hundred and thirty one thousandths (9,525.931) tons of ore to said defendant and has duly requested said defendant and accepted the same and pay therefor "and has otherwise in all respects complied with and performed, or tendered performance of the provisions of said contract."

XI. Upon information and belief, that after the said Beer, Sondheimer & Company had refused to accept the said ore as hereinabove alleged, the Mammoth Copper Mining Company of Maine sold the said nine thousand five hundred twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore for the best obtainable prices and at the then market value, to wit, for the sum of Two hundred thirty-eight thousand two hundred seventy-eight and seventy-six one hundredths (\$238,278.76) Dollars.

XII. Upon information and belief, that the amount which was due to be paid to the Mammoth Copper Mining Company of Maine by Beer, Sondheimer & Company for said nine thousand five hundred twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore at the price stipulated in said [fol. 1054] contract is the sum of Five hundred and eleven thousand, one hundred and three and sixty-four one hundredths (\$511,103.64) Dollars. That the difference between said amount and the amount realized by the Mammoth Copper Mining Company of Maine in the sale of said nine thousand five hundred twenty-five and nine hundred and thirty-one thousandths (9,525.931) tons of zinc crude ore on the market is Two hundred seventy-two thousand, eight hundred twenty-four and eighty-eight one hundredths (\$272,824.88) Dollars.

XIII. Upon information and belief, that the Mammoth Copper Mining Company of Maine duly performed all of the conditions of said contract on its part to be performed.

XIV. Upon information and belief, that the defendant Beer, Sondheimer & Company, Inc., on or about the 25th day of August, 1915, for a valuable consideration to it moving from the said copartnership firm of Beer, Sondheimer & Company by an instrument in writing subscribed by it, assumed certain obligations and liabilities of said copartnership firm, including the obligations and liabilities of said co-partnership firm to the said Mammoth Copper Mining Company of Maine under the said contract dated August 26, 1914.

XV. Upon information and belief, that by reason of the premises the Mammoth Copper Mining Company of Maine has been and is damaged in the sum of Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight one hundredths (\$272,- [fol. 1055] 824.88) Dollars, with interest from the date of payment became due under said contract to September 4, 1916, amounting to Sixteen thousand three hundred forty-two and fifty-four one hundredths (\$16,342.54) Dollars, no part of which has been — though duly demanded.

XVI. That prior to the commencement of this action and on or about the 27th day of September, 1916, the said Mammoth Copper Mining Company of Maine duly assigned and transferred to the plaintiff herein all claims and causes of action which it had against the defendants herein, arising under said contract of August 26, 1914, or otherwise.

Wherefore, the plaintiff prays for judgment against the defendants and each of them for the sum of Two hundred eighty-nine thousand, one hundred sixty-seven and forty-two one hundredths (\$289,167.42) Dollars, with interest on Two hundred seventy-two thousand eight hundred twenty-four and eighty-eight one hundredths (\$272,824.88) Dollars from September 4, 1916, besides the costs of this action.

Charles W. Stockton, Attorney for Plaintiff, Office and P. O.
Address 51 Broadway, Borough of Manhattan, City of New York.

[fol. 1056] Affidavit of F. Y. Robertson to Schedule B omitted in printing.

(Here follows side folio page 1057)

[fol. 1057]

DEFENDANT'S EXHIBIT "A" (BEFORE MASTER)

Altoona Earnings from July 1st, 1915, to Sept. 30, 1916

Month	Dry tonnage	Operating profit	Quotational profit or loss	Profit on custom ores	Profit on toll ores and residues, etc.	Profit as per cost sheets
July—1915	4,179	\$93,819.72	\$74,044.37*	\$19,775.35	\$69.73*	\$19,705.62
August	2,900	67,393.25	36,659.91*	30,733.34	.....	30,733.34
September	3,181	18,424.55	1,674.98*	16,749.57	.....	16,749.57
October	3,231	45,834.37	31,613.04	77,447.41	.....	77,447.41
November	2,980	82,402.78	4,797.95	87,200.73	.....	87,200.73
December	3,269	91,812.63	46,234.03*	45,578.60	.....	45,578.60
December Inventory Adjust- ment .....	.....	.....	.....	.....	1,969.17*	1,969.17
Total—6 months...	19,740	399,687.30	122,202.30*	277,485.00	2,038.90*	275,446.10
January—1916	3,013	43,923.59	29,862.34*	14,061.25	15,020.02	29,081.27
February	2,618	47,116.09	38,649.41*	8,466.68	12,413.75	20,880.43
March	3,091	51,831.10	11,322.49*	40,508.61	15,245.26	55,753.87
April	3,031	19,096.65	88.28	19,184.93	39,884.57	59,069.50
May	3,474	45,254.47	24,574.35	69,828.82	13,306.27	83,135.09
June	2,920	64,232.75	12,308.22	76,540.97	504.46*	76,036.51
July	3,034	46,362.89	51,257.18*	4,894.29*	47.68*	4,941.97*
August	3,486	53,047.74	53,565.35*	517.61*	511.51*	1,029.12*
September	3,371	25,775.57	23,874.51*	1,901.06	1,834.20	3,735.26
Total thru to Sep- tember.....	47,778	\$796,328.15	\$293,782.73*	\$502,565.42	\$94,601.52	\$597,166.94
Less:						
Interest on Working Capital, as per Schedule "A"						\$16,955.80
Proportion of Administration, as per Schedule "A"						8,092.22
Interest on Investment, as per Schedule "B"						26,129.55
Proportion of loss on the Sale of Plant, as per Schedule "C"						159,970.79
						<u>211,148.36</u>
Net Profit						\$386,018.58
Less: Additional cost per ton of treating Sulphide Ore, as per Schedule "D"						<u>\$8.0794</u> 1.4571
Profit per ton on Sulphide Ore.....						<u>\$6.6223</u>

*Indicates loss.

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Statement of Interest on Working Capital and Altoona's Proportion of Administration Charged to the Zinc Department of U. S. Smelting Company

Date	6% interest on working capital	Total zinc dept. administration	One-half applicable to Altoona	Miscellaneous	Total interest & administration
July—1915	.....	.....	.....	.....	.....
August	\$1,626.09	\$751.57	\$375.79	.....	\$2,001.88
September	1,099.27	134.83	67.41	.....	1,166.68
October	1,027.30	895.00	447.50	.....	1,474.80
November	1,058.96	255.84	127.92	.....	1,186.88
December	1,164.61	616.69	308.35	.....	1,472.96
6 Months' total 1915..	5,976.23	2,653.93	1,326.97	.....	7,303.20
January—1916	1,298.17	798.78	399.39	.....	1,697.56
Total Interest not on Cost Sheets	7,274.40	.....	.....	.....	.....
February—1916	*1,032.66	1,095.28	547.64	.....	1,580.30
March	* 895.54	3,159.92	1,579.96	.....	2,475.50
April	* 772.27	1,349.47	674.73	\$2,415.00	3,862.00
May	* 970.40	1,785.73	892.87	2,415.00	551.73
June	*1,517.05	1,613.89	806.94	.....	2,323.99
July	*1,868.73	1,376.61	689.31	.....	2,558.04
August	*1,659.51	1,023.01	511.50	.....	2,171.01
September	* 965.24	1,325.82	662.91	.....	1,628.15
Total thru September, 1916.....	\$16,955.80	\$16,184.44	\$8,092.22	.....	\$25,048.02

*As proportioned out by the Plant Office.

[fol. 1059]

Schedule "B"

Interest on Investment at 8% per Annum from date of Purchase to Date of Sale of Altoona Plant Property

Date of purchase and additions	Date of	Amount	Days	Interest
June 19, 1915 to September 30, 1916.		\$225,000.00	469	\$23,450.00
July 31, " "	" "	343.85	427	32.63
Aug. 31, " "	" "	889.68	396	78.29
Sept. 30, " "	" "	318.45	366	25.90
Oct. 31, " "	" "	19,175.13	335	1,427.48
Nov. 30, " "	" "	367.06	305	24.88
Dec. 31, " "	" "	4,103.40	274	249.85
Jan. 31, 1916 " "	" "	451.75	243	24.39
Feb. 29, " "	" "	5,907.92	214	280.95
Mar. 31, " "	" "	10,030.69	183	407.91
Apr. 30, " "	" "	2,977.85	153	101.25
July 31, " "	" "	1,919.72	61	26.02
		<hr/>		
	Int. to Sept. 30/16..	\$271,485.50		\$26,129.55
Oct. 1, 1916 to February 18, 1918.		\$271,485.50	506	\$30,527.04
Mar. 31, 1917 to February 18, 1918.		5,959.21	324	429.06
		<hr/>		
Total Interest June 19, 1915 to February 18, 1918		\$277,444.71		\$30,956.10
				\$57,085.65

Schedule "C"

Purchase and Sale of Altoona Plant

June, 1915, Purchase price of plant.....	\$225,000.00
Additions to March 31, 1917.....	52,444.71
Total Cost of Plant.....	<u>\$277,444.71</u>
Less: Sale of plant as at February 18, 1918.....	15,959.21
Loss on Sale of Property.....	<u>\$261,485.50</u>

Above loss distributed as follows:

Total tonnage treated during life of plant.....	78,099 Tons
Rate per ton.....	\$3.348+

Amount of Loss Applicable from July 1, 1915 to Sept. 30, 1916

Tonnage treated—47,778 @ \$3.348+	\$159,970.79
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Amount of Loss Applicable from Oct. 1, 1916 to Dec. 31, 1917

Tonnage treated—30,321 @ 3.348+	\$101,514.71
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[fol. 1060]

Schedule "D"

Cost of Treating Sulphide Ore at Altoona

July 1, 1915, to Sept. 30, 1916

Date	Roasting cost		Cost per ton
	Tons roasted	Cost of roasting	
July 1 to Dec. 31, 1915.....	10,025.4	\$31,175.66	\$3.109
Jan. to Sept 30, 1916.....	16,973.41	59,284.38	3.493
Total Roasting Cost...	26,998.81	\$90,460.04	<u>\$3.3505</u>

Date	Smelting cost—All ore		Cost per ton
	Tons treated	Cost of smelting	
July 1 to Dec. 31, 1915.....	19,740.914	\$308,979.91	\$15.652
Jan. 1 to Sept. 30, 1916....	26,037.520	543,324.09	19.378
Total Smelting Cost (of all ore to Sept., '16)	47,778.343	\$852,304.00	<u>\$17.8387</u>

Cost of Treating Sulphide Ore

	Tons	Cost	Cost per ton
Smelting cost (as above) ..	47,778.434	\$852,304.00	\$17.8387
Less:			
Cost of Roasting (as above)		90,460.04	.....
	<u>47,778.434</u>	<u>\$761,843.96</u>	<u>\$15.9453</u>
Add: Roasting Cost per ton (as above)			3.3505
Total cost of treating Sulphide Ore			<u>19.2958</u>
Less: Cost per ton of treating all ore (as above)			<u>17.8387</u>
Additional cost per ton due to treating Sulphide Ore			<u>\$1.4571</u>

(Here follows Defendants' Exhibit "B" (before Master), marked side folio page 1061)

[fol. 1061]

DEFENDANTS' EXHIBIT "B" (BEFORE

Iola Earnings for February and March

Month	Dry tonnage	Operating profits	Quotational profit or loss	Profit on custom ore
February, 1916.....	2,235	\$70,378.79	\$45,307.57*	\$25,071.22
March	2,529	94,827.41	74,192.86*	20,634.55
	<u>4,764</u>	<u>\$165,206.20</u>	<u>\$119,500.43</u>	<u>\$45,705.77</u>

Less:

Interest on Working Capital,	As per Schedule F.....
Proportion of Administration,	" " " F.....
Interest on Investment,	" " " G.....
Proportion of Loss on Plant Property	" " " H.....

Loss
Additional cost per ton on treating Sulphide Ore as per Schedule "I".....

Loss

*Indicates loss.

(BEFORE MASTER)

and March, 1916

Profit on atom ore	Profit on toll ores, etc.	Profit as per cost sheets	Per ton
3,071.22	\$2,514.74	\$27,585.96	
1,634.55	3,483.61	24,118.16	
<hr/>	<hr/>	<hr/>	
4,705.77	\$5,998.35	\$51,704.12	\$51,704.12
.....		\$2,154.18	
.....		1,418.40	
.....		5,203.63	
.....		59,471.87	
		<hr/>	68,248.08
			<hr/>
.....		\$16,543.96	= \$3.4727
.....			1.0884
			<hr/>
.....			\$4.5611

Iola Plant

Statement of Interest on Working Capital and Iola's Proportion of Administration Charged to the Zinc Department of the U. S. Smelting Company

Date	6% interest on working capital	Total zinc dept. administration	Applicable to Iola ‡	Total of interest & administration
July—1915	.....	.....	.....	.....
August	\$262.76	\$751.57	\$250.52	\$513.28
September	640.44	134.83	44.94	685.38
October	1,154.67	895.00	298.33	1,453.00
November	1,016.21	255.84	85.28	1,101.49
December	1,415.34	616.69	205.56	1,620.90
January—1916	1,508.40	798.78	266.26	1,774.66
Total at January, 1916	\$5,997.82	\$3,452.71	\$1,150.89	\$7,148.71
Interest on working capital as proportioned by plant				
February—1916	\$1,172.99	\$1,095.28	\$365.09	\$1,538.08
March—1916	981.19	3,159.02	1,418.40	2,034.50
2 months' total	\$2,154.18	\$4,255.20	\$1,418.40	\$3,572.58

[fol. 1063]

Schedule "G"

Interest on Investment @ 8% per annum from Date of Purchase to Date of Transfer of Iola Plant, Namely, from July 1, 1915, to Aug. 15, 1916, and Segregated as Given Below

Date of purchases and additions	Date of	Amount	Days	Interest
July 1, 1915 to January 31, 1916.		\$188,609.95	214	\$8,696.45
July 31, " " " "	"	10,015.49	184	384.99
Aug. 31, " " " "	"	8,981.31	153	305.36
Sept. 30, " " " "	"	132,260.31	123	3,615.12
Oct. 31, " " " "	"	17,807.18	92	364.06
Nov. 30, " " " "	"	10,161.14	62	144.00
Dec. 31, " " " "	"	11,619.62	31	82.11
Total cost of property to Jan. 1st.		\$379,755.20	Interest to Jan. 31.	\$13,865.09
Jan. 31, 1916 to March 31st, 1916.		\$379,755.20	60	\$5,063.40
Jan. 31, " " " "	"	9,157.38	60	122.10
Feb. 29, " " " "	"	2,630.63	31	18.13
Total cost of property Mar. 1, 1916.		\$391,543.21	Int. Jan. 31 to Mar. 31, '16.	\$5,203.63
Apr. 1, 1916 to Aug. 15, 1916.		\$391,543.21	137	\$11,920.32
Apr. 1, " " " "	"	2,644.54	137	80.51
Apr. 30, " " " "	"	30,000.00	107	713.33
July 31, " " " "	"	9,449.15	15	31.50
Total cost of property		\$433,636.90	Int. Apr. 1 to Aug. 15/16.	\$12,745.66
Total Interest July 1, 1915 to August 15, 1916.				\$31,814.38

[fol. 1064]

Schedule "H"

Cost of Iola Plant

July 1, 1915, Purchase price of plant.....	\$338,609.95
July, 1915 to July 31, 1916, Additions to plant.....	95,026.95

Total cost of plant.....	\$433,636.90
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Less: Scrap value assumed when property was deeded to J. B. Kirk Company incidental to purchase of Checotah plant for \$325,000 cash.....	25,000.00
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Loss on the Property.....	\$408,636.90
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Tonnage treated from July 1, 1915 to August 15, 1916, being date the property was transferred...	32,734 Tons
Rate per ton on above loss	\$12.4836

Amount of loss applicable from July 1, 1915 to January 31, 1916 15,638 Tons @ \$12.4836	\$195,217.65
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Amount of loss applicable from February 1 to March 31, 1916 4,764 Tons @ \$12.4836	\$59,471.87
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Amount of loss applicable from April 1 to August 15, 1916 12,332 Tons @ \$12.4836	\$153,947.38
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[fol. 1065]

Schedule "I"

Cost of Treating Sulphide Ore at Iola February and March 1916

Roasting Cost

Month	Tons treated	Cost of roasting	Cost per ton
February	1,120.00	\$4,138.64	\$3.6952
March	1,973.082	5,458.34	2.7664
	<u>3,093.082</u>	<u>\$9,596.98</u>	<u>\$3.1027</u>

Smelting Cost—All Ore

Month	Tons treated	Cost of smelting	Cost per ton
February	2,235.00	\$46,610.75	\$20.855
March	2,529.60	51,922.96	20.526
Smelting Cost 2 Months ...	4,764.6	\$98,533.71	\$20.6803

Cost of Treating Sulphide Ore

	Tons treated	Cost of treatment	Cost per ton
Smelting Cost (as above) ..	4,764.6	\$98,533.71	\$20.6803
Less: Cost of Roasting (as above) .....	.....	9,596.98	.....
	4,764.6	\$88,936.73	\$18.666
Add: Cost of Roasting per ton (as above)			3.1027
Total cost of treating Sulphide Ore			\$21.7687
Less: Cost per ton of treating all ore (as above)			20.6803
Additional cost due to treating Sulphide Ore ..			\$1.0884

[fol. 1066] DEFENDANTS' EXHIBIT "C" (BEFORE MASTER)

This exhibit is a large volume containing "cost sheets" covering the operations by month of the Altona and Iola smelters of the United States Smelting Company during the period embraced in the suit.

It is impracticable to print Exhibit C either in its entirety or by way of summary, but the original exhibit will be available for the Court and counsel upon the argument and consideration of the appeal.

DEFENDANTS' EXHIBIT D

United States Smelting Company
Needles Mining and Smelting Company
Geo. W. Heintz, General Manager

Mammoth Copper Mining Company
Ore Purchasing Department
Salt Lake City, Utah

Mr. B. Elkan,
c/o Beer, Sondheimer & Co.,
61 Broadway, New York.

July 28, 1914.

DEAR SIR:

The writer just returned to the city and finds your letter of the 14th relative to the handling of residues at your eastern copper

[fol. 1067] smelter. We are contemplating the shipment of a considerable quantity of zinc ore and concentrates containing no lead but a high per cent of copper. We figure that the residues from this product will run about as follows:

Gold	Silver	Copper	Silica	Iron	Carbon
3	9 oz.	7%	15%	10%	40%

Will you kindly advise as to the best terms you would be willing to apply on such product providing a contract was entered into covering a period of two or three years. Will you also kindly state as to the best price you would be willing to pay for copper-zinc concentrates running 40% zinc and the copper running about 4½%. As we know fairly well as to the zinc price we could expect the copper quotation is all that will be necessary.

Yours very truly, United States Smelting Company, By W.
H. Eardley. WHE:LA.

[fol. 1068]

DEFENDANTS' EXHIBIT E

United States Smelting Company
Geo. W. Heintz, General Manager
Ore Purchasing Department
Salt Lake City, Utah

Oct. 14, 1914.

Beer, Sondheimer & Co.,
61 Broadway,
New York.

DEAR SIRs:

Settlements for zinc ore shipped from Kennett, Calif., will be handled from this office in the same manner as we handle shipments from Needles and would therefore kindly request that you notify the National Zinc Company to forward zinc samples here on all lots and we will assay and advise you the date when assays will go forward so that they can cross in the mails.

Your attention to this matter will greatly oblige,

Yours very truly, United States Smelting Company, By W.
H. E. WHE:LA.

[fol. 1069]

DEFENDANTS' EXHIBIT F

Mammoth Copper Mining Company of Maine

Kennett, California, November 2nd, 1914.

Messrs, Beer, Sondheimer & Co.,
61 Broadway,
New York, N. Y.

GENTLEMEN:

Your letter of October 26th is just received.

In reply would say that as we were advised that arrangements had been made for the United States Smelting Company to handle the matter of assays and settlements on our shipments of zinc ore, we did not assay the pulps of lots 4 and 5 which you sent to us, but have forwarded same to the U. S. Smelting Co. They will, doubtless, advise you of their assays as soon as they are out.

Yours very truly, G. W. Metcalfe, Manager. C. C. U. S.
Sm. Co. GWM:RH.

[fol. 1070]

DEFENDANTS' EXHIBIT G

United States Smelting Co.,
Salt Lake City, Utah.

Nov. 30, 1914.

GENTLEMEN:

Zinc Ore—Mammoth Copper Mining Co.

Enclosed we beg to hand you copy of our account sales.

Lot #4 car 2562/40268 amounting to.....	\$160.64
5 " 54578 " "	303.50
6 " 3103 " "	516.01
	<u>\$979.15</u>

from which we are deducting balance due us on

Lot #3 Car 53276	77.00
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thus leaving a balance in your favor of	\$902.15
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for which we are making remittance to the United States Smelting,
Refining & Mining Co. in Boston.

Yours very truly, Beer, Sondheimer & Co. A. B. Encs.
CC. to U. S. S R. & M. Co., Boston. HS.—Salt Lake City.

[fol. 1071]

DEFENDANT'S EXHIBIT H

United States Smelting Company
 Geo. W. Heintz, General Manager
 Ore Purchasing Department

Salt Lake City, Utah, Dec. 4, 1914.

Beer, Sondheimer & Co.,
 61 Broadway,
 New York City, N. Y.

GENTLEMEN:

We today received your settlements for lots 4, 5 and 6, zinc ore shipped to your plant at Bartlesville by the Mammoth Copper Mining Co. We wish to call your attention to your copper settlement,

which you have based on the E. & M. J. quotation for the week of November 2nd to 7th. If you will refer to contract covering this product, you will find that the copper payment is based on the week of the bill of lading, which was September 15th. The settlement price for copper for the month of September, as used by all the smelters throughout the country, was 12.02. We therefore kindly request that you make up corrected settlements on this basis, and oblige.

Yours very truly, United States Smelting Company, By W.
 H. E. WHE:MM.

[fol. 1072]

DEFENDANT'S EXHIBIT I

Western Union

October 22, 1914.

To G. W. Metcalfe,
 Mammoth Copper Mining Company,
 Kennett, Calif.:

Kindly wire what you expect your zinc tonnage to be for October and also your estimate of November zinc tonnage.

Herbert Salinger. Charge.

DEFENDANTS' EXHIBIT J

Western Union

Oct., 1914.

Kennett Cal. 22:
 Herbert Salinger,
 Ore Purchasing Dept.,
 Newhouse Bldg., Salt Lake, Ut.:

Zinc ore tonnage depends altogether on market price of spelter.

G. W. Metcalfe. //

[fol. 1073]

DEFENDANTS' EXHIBIT K

The Western Union Telegraph Company, Incorporated

October 24, 1914.

G. W. Metcalfe,
Mammoth Copper Mining Co.,
Kennett, Calif.:

// Firm advise spelter now four ninety to five. Kindly advise what
you expect to ship if this or better prevailed.

Herbert Salinger. Charge.

DEFENDANTS' EXHIBIT L

Western Union

100 S. F. W. 24 N. L.

Kennett, Cal., Oct. 26, 1914.

Mr. Herbert Salinger,
Newhouse Bldg., Salt Lake, Utah:

// With spelter quotations below five shipments will be very light if
it rises above five will probably ship about two hundred tons per
month.

G. W. Metcalfe. 10:47 p. m.

[fol. 1074]

DEFENDANTS' EXHIBIT M

Western Union Telegraph Company, Incorporated

G. W. Metcalfe,
Mammoth Copper Mining Co.,
Kennett, Calif.:

November 20, 1914.

// Kindly wire collect your probable tonnage for next month spelter
now five dollars and looks strong.

Herbert Salinger. Charge.

DEFENDANTS' EXHIBIT N

Western Union Telegram

A 154 F 11.
Kennett Cal. 23.

Nov., 1914.

Herbert Salinger,
Newhouse Bldg., Salt Lake, Utah:

If spelter remains above five estimate December tonnage at two
hundred.

G. W. Metcalfe.

[fol. 1075]

DEFENDANTS' EXHIBIT O

April 6, 1915.

Mammoth Copper Mining Company,
Newhouse Building,
Salt Lake City, Utah.

DEAR SIRs:

We regret that at the personal conference which our Mr. Elkan held yesterday with your Mr. Lyon, we were not able to get Mr. Lyon on your behalf to recede from the position that you are entirely free, in your discretion, to refrain altogether from shipping us any ore, or to ship to us as much as you may desire. Mr. Lyon insists that you have the right to ship nothing or to ship 4,000 tons a month, as you may desire, and he takes the position that it would be entirely as a favor to us for you to limit your shipments to 1,200 tons a month.

We have been anxious to avoid litigation and to make a satisfactory arrangement with you before bringing lawyers into the matter at all, and to that end we have withheld writing you until we had conferred with Mr. Lyon. As you know, it has always been understood that your shipments of ore would not exceed 400 tons a month, and until March your monthly shipments were far below that figure. There is, of course, a limit to the amount of ore which our smelter can handle, and we cannot permit you, merely because the price of spelter has risen, to treat as much of your product as zinc crude ore as you may desire; furthermore, an examination of the recent shipments shows that the shipments did not consist of crude ore. You, of course, have fully understood that we would not accept concentrates.

[fol. 1076] We now wish formally to advise you that, waiving no legal rights as to whether we are legally bound to accept any shipments and merely seeking to establish a harmonious working arrangement, we are willing to arrange to take delivery from you of zinc crude ore not to exceed a maximum of 400 tons per month. Any receipts in excess of that tonnage, as well as any shipments containing anything except crude ore will not be accepted; and please permit us again to state that we will be glad at any time to try again in personal conference with your representative to make an arrangement which is mutually satisfactory.

Very truly yours, Beer, Sondheimer & Co. A. B. CC-FL.

DEFENDANTS' EXHIBIT P

Room 400 55 Congress Street
Boston

April 15, 1915.

Beer, Sondheimer Company,
61 Broadway,
New York City.

DEAR SIRs:

Your letter of April 6th was received.

Your agreement with us dated August 26th, 1914, calls for the total production of zinc crude ore shipped from our properties in [fol. 1077] Shasta County, California and running not less than thirty-three per cent. metallic zinc. The agreement is for one year from date of first shipment after the completion of picking plant then in contemplation and not exceeding eighteen months from August 26, 1914. The picking plant was completed February, 1915. Therefore, the agreement runs to February, 1916. We are and will be at all times, while the agreement is in force ready and willing to ship to you the total production as provided in the agreement, and we hereby notify you that we refuse to agree to a maximum of four hundred tons per month, as stated in your letter, but insist that you must take the total production from our properties and that if you fail to accept the total production, we will endeavor to sell for the best obtainable prices, such part as you fail to accept and hold you responsible for any loss sustained by us.

Very truly yours, Mammoth Copper Mining Company of
Maine, By Frederick R. Lyon, Vice-President. FL-K-B.
CC-Mr. Sutro.

[fol. 1078] DEFENDANT'S EXHIBIT Q FOR IDENTIFICATION

Beer, Sondheimer & Co.,
61 Broadway,
New York:

Salt Lake Utah, May 25, '15.

Replying to your wire fifteenth wire your proposition for satisfactory and complete adjustment of controversy with Mammoth Company.

United States Smelting Company.

DEFENDANT'S EXHIBIT R FOR IDENTIFICATION

United States Mining Company

United States Smelting Company

Salt Lake City, Utah, May 7, 1915.

National Zinc Company,
Bartlesville, Oklahoma.

DEAR SIRs:

We have just wired you as follows:

"Please permit unloading for our account of Mammoth ore within your yards. If agreeable sample as unloaded and weigh loads and empties for record of tonnage. We accept responsibility and do not [fol. 1079] commit you to acknowledgment of its receipt. Confirming by letter."

which we beg now to confirm.

Yours very truly, United States Smelting Company, (Sgd.)
By George W. Heintz, General Manager.

DEFENDANT'S EXHIBIT S

Ore Contract

This agreement made and entered into this 10th day of June, 1914, by and between the United States Smelting Co., a corporation existing under and by virtue of the laws of the State of Maine, party of the first part, and hereinafter designated as the "Seller," and The American Metal Company, Limited, of New York City, N. Y., party of the second part, and hereinafter designated as the "Buyer."

Witnesseth:

That for and in consideration of the sum of one dollar (\$1.00) each to the other in hand paid by the parties hereto and the mutual terms and agreements herein contained, the seller agrees to sell and deliver, and the buyer agrees to purchase and receive, the product hereinafter specified upon the terms and conditions hereinafter set forth:

[fol. 1080]

Product

The product covered by this contract is all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller during the period of this agreement. There shall be excepted from this agreement all zinc products under contract to the American Zinc Lead & Smelting Company, or which the seller may be compelled to ship to the American Zinc Lead & Smelting Company by virtue of the existing agreement.

The buyer is not obligated to accept any of the product running less than thirty-five per cent (35%) metallic zinc. Should the seller produce a zinc product running less than thirty-five per cent. (35%) metallic zinc, the buyer reserves the option to purchase same under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere. Nor shall the buyer be obligated to accept any shipment fifty per cent. of which passes a one hundred mesh screen.

There shall also be excepted from this contract all product made by what are termed "flotation methods." Should the seller produce any product by "flotation methods," the buyer has the privilege of accepting such product under the terms of this contract. Should the buyer not elect to receive such product, then the seller shall be free to dispose of same elsewhere.

Period and Quantity

This contract shall run for a period of two (2) years, beginning June 10th, 1914, and ending June 10th, 1916. The tonnage sold [fol. 1081] and purchased under this contract shall not exceed eight hundred (800) tons per month. Should the seller produce a tonnage in excess of this amount, the buyer reserves the option to purchase same under the terms of this contract. If the buyer should

not elect to purchase such excess production within 10 days after receiving notice from the seller, the seller shall have the privilege of disposing of it elsewhere.

Delivery

All of the product shall be delivered by the seller f. o. b. cars at the buyer's smelting works at Bartlesville, Oklahoma, or such other works as may be designated by the buyer. Provided that if there is any difference in freight between the shipping point and the smelting works so designated as against the freight between shipping point and Bartlesville, Oklahoma, the same shall be for the account of buyer.

Sampling

The sampling shall be done, at the option of the seller, by the buyer free of charge or by the Utah Ore Sampling Company at the expense of the seller. In the event the product is sampled by the Utah Ore Sampling Company the weights taken at the works of the Utah Ore Sampling Company and the assays made on the pulp samples furnished by the Utah Ore Sampling Company shall govern in settlement. If the product is sampled by the buyer, the seller shall have the privilege of having a representative present to watch the weighing, moisturing and sampling of the product. Should the weights and sampling methods of the Utah Ore Sampling Co. [fol. 1082] or of the weights and sampling methods of the buyer not be satisfactory to both parties, then the method of weighing and sampling shall be decided by arbitration.

Assaying

Each of the parties shall have assays made on the settlement samples. Should such assays agree with the splitting limits the average of same is to be taken for settlement.

The splitting limits shall be:

Gold .....	.02 oz.
Silver .....	.5 "
Lead .....	.5%
Zinc .....	.5%

or any greater amounts mutually agreed upon.

Should the assays fail to agree within the splitting limits, an umpire assay shall be made by the following chemists, each chemist to be taken in rotation:

Leonard & Root, of Denver.
 Pitkin & Co., of New York City.
 Ledoux & Co., of New York City.

Should the umpire's results fall between the other two results, the umpire assay shall be taken for settlement. Should the umpire's result fall above the higher or below the lower assay, then the assay nearest the umpire shall be taken for settlement.

In every case the party whose assay is farthest from the umpire's assay shall pay the umpire's charges.

[fol. 1083]

Payments

Gold—70% of the gold contents to be paid for at \$19.00 per oz.

Silver—60% of the contents to be paid for at the New York price for silver according to Engineering & Mining Journal on date of shipment.

Lead—60% of the contents to be paid for as per dry assay (wet less 1.5 units) at 40¢ per unit, if 5% dry or over. No pay if under 5% dry lead.

Iron—To be paid for at 10¢ per unit.

Silica—To be charged for at 10¢ per unit.

Zinc—\$19.00 per dry ton for product containing 40% zinc, with a St. Louis spelter price of \$5.00 per cwt.

For each unit of zinc in excess of 40% a credit of \$1.00 will be allowed.

For each unit less than 40%, a debit of \$1.00 will be made.

For each raise in the price of spelter above \$5.00 per cwt, a credit of 4¢ per ton will be allowed.

For each cent drop in the price of spelter under \$5.00 per cwt. a debit of 4¢ per ton will be made.

The price of spelter to govern shall be that quoted in the Engineering & Mining Journal for the week of the date of the bill-of-lading.

Treatment Charge—\$3.25 per ton of ore when payments for gold, silver, lead and iron, after deducting 10¢ per unit Silica, exceed this

amount. If payments for gold, silver, lead and iron, after deducting 10¢ per unit Silica, do not amount to \$3.25 per ton of ore, no charge [fol. 1084] and no payment shall be made, and only the zinc contents shall be considered in the accounting.

Lime—1½% to be allowed free; the excess above 1½% to be charged for at \$1.00 per unit. (Fractions pro rata.)

Quality—Material to be sulphide, reasonably free from arsenic and fluorine and not to be undesirable for the production of acid.

Terms—Cash upon agreement of assays.

Delays from Strikes, etc.

Whenever the production or shipment of ore by the seller or the receipt or treatment of the ore by the buyer is prevented or delayed by acts of nature or the public enemy, strikes, riots, fires, floods, financial disturbances, contingencies of transportation, the order, judgment or decree of any court, or the act of any public officer, or any cause whatever beyond the control of the party so prevented or delayed, whether the same is included in the foregoing enumeration in express terms or otherwise, this agreement shall be suspended during such delay or prevention. The seller, if so prevented or delayed in producing or shipping the ore hereby contracted for shall not be under any duty or obligation to furnish any ore to the buyer, the production or shipment of which is so prevented or delayed, while the seller is so prevented or delayed, and the buyer, if so prevented or delayed in receiving or treating ore hereby contracted for, shall not be under any duty or obligation to receive any of the ore hereby contracted for, while so prevented or delayed.

[fol. 1085]

Arbitration

If any differences arise between the parties hereto as to the interpretation and fulfilment of this contract, such question shall be referred to a committee of arbitration, consisting of one arbitrator to be appointed by each party hereto. If said arbitrators are unable to agree, it shall be their privilege to choose an umpire and a decision of the majority shall be final. Every award or finding of such arbitrators shall be binding on both parties hereto. If either party fails to appoint an arbitrator within twenty (20) days after receipt of written notice requesting him so to do, it is hereby agreed that the decision shall be for the other party.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals, the day and year first above written, binding their companies, partners, successors and assigns.

Executed in triplicate.

_____, by _____. The American Metal Company,
Ltd., by _____.

[fol. 1086]

Salt Lake City, Utah, July 8, 1914.

The American Metal Company, Limited,
Denver, Colorado.

GENTLEMEN:

We have your letter of the 6th, enclosing executed contracts for zinc products shipped under the control of this company for the next two years. The product which must be shipped to the American Zinc Lead and Smelting Company is all product produced on the Huff machines.

We note that the splitting limits for iron, silica and lime, as suggested by us, are satisfactory.

Yours very truly, United States Smelting Company.

United States Smelting Co.,
Salt Lake City, Utah.

July 6, 1914.

DEAR SIR:

We beg to acknowledge, with thanks, receipt of your favor of the 2nd instant enclosing executed contract. We now beg to hand you herewith duplicate copies properly executed by our Vice-President, Mr. C. M. Loeb.

When the signer had the pleasure of seeing your Mr. Heintz he requested him to accompany this contract with a letter setting forth [fol. 1087] more clearly the products under contract to The American Zinc Lead Smelting Company, and we would appreciate it if you would let us have a few lines covering this point.

We note that the splitting limits for iron, silica and lime, as suggested and lime, and have in accordance herewith made notations on the contract.

Yours very truly, The American Metal Company, Ltd., By
H. V. Putzel. HVP/Mcf.

United States Smelting Co.

Salt Lake City, Utah

Mr. H. V. Putzel,
Assistant Mgr. American Metal Co.,
825 A. C. Foster Bldg.,
Denver, Colo.

July 3, 1914.

DEAR SIR:

In the contract which has been drawn up covering the shipment of zinc ore to you, there is nothing stated as to the splitting limits on iron, silica or lime. If agreeable we will make the limits 1% on iron and silica and .4 of 1% on the lime when either assay is above the free limit.

Kindly advise if satisfactory.

Yours very truly, (Signed) W. H. E. WHE/LA. Copy—
Mcf.

[fol. 1088]

DEFENDANTS' EXHIBIT "T"

United States Smelting Company
Salt Lake City

July 15, 1914.

American Metal Company,
Denver, Colorado.

DEAR SIRs:

There is a possibility of shipping from one of our properties several thousand tons of zinc sulphide concentrates assaying approximately as follows:

Au.	Ag.	Cu.	Pb.	SiO ₂	Fe.	Zn.	
.215	7.6	4.4	..	12.9	10.8	27.5	No Lime.

The terms we have arranged with your company do not show any payment for copper, and it would not be profitable for us to ship this product to you and lose the higher copper content. Please advise us promptly the basis on which you could make payment for copper in this product.

An early reply will be appreciated.

Yours very truly, United States Smelting Company.
(Signed) W. H. Eardley.

[fol. 1089]

DEFENDANT'S EXHIBIT U

Average weekly quotations for east St. Louis Spelter as published by the Engineering & Mining Journal.

		Published	Per lb.
Aug.	1 to Aug. 5, 1914	8/ 8/14	4.78125¢
	6	8/15/14	4.971
	13	8/22	5.55
	20	8/29	5.846
	27	9/5	5.842
Sept.	3	9/12	5.99
	10	9/12	5.271
	17	9/26	5.05
	24	10/3	4.896
Oct.	1	10/10	4.75
	8	10/17	4.55
	15	10/24	4.696
	22	10/31	4.9375
	29	11/7	4.875
Nov.	5	11/14	4.825
	12	11/21	4.921
	19	11/28	5.073
	26	12/5	5.165

			Published	Per lb.
Dec.	3	9,	12/12	5.438
	10	16,	12/19	5.510
	17	23,	12/26	5.460
	24	30,	1/2/15	5.39
	31	Jan. 6, 1915	1/9	5.515
Jan.	7	13,	1/16	5.808
	14	20,	1/23	6.025
	21	27,	1/30	6.729
	28	Feb. 3,	2/6	7.375
Feb.	4	to 10,	2/13	7.854
	11	17,	2/20	8.24
	18	24,	2/27	8.638
	25	Mar. 3,	3/6	9.479
[fol. 1090]				
Mar.	4	10,	3/13	8.—
	11	17,	3/20	7.875
	18	24,	3/27	8.417
	25	31,	4/3	8.479
Apr.	1	Apr. 7,	4/10	8.813
	8	14,	4/17	9.—
	15	21,	4/24	9.479
	22	28,	5/1	11.146
	29	May 5,	5/8	12.354
May	6	12,	5/15	12.833
	13	19,	5/22	13.417
	20	26,	5/29	16.125
	27	June 2,	6/5	21.7
June	3	9,	6/12	25.—
	10	16,	6/19	21.375
	17	23,	6/26	17.875
	24	30,	7/3	19.167
July	1	July 7,	7/10	20.60
	8	14,	7/17	20.958
	15	21,	7/24	18.75
	22	28,	7/31	17.063
	29	Aug. 4,	8/7	15.229
Aug.	5	11,	8/14	13.479
Aug.	12	1915 to 18,	8/21/15	10.708
	19	25,	8/28	10.875
	26	Sept. 1,	9/4	14.458
Sept.	2	8,	9/11	13.65
	9	15,	9/18	13.104
	16	22,	9/25	12.875
	23	29,	10/2	13.396
	30	Oct. 6,	10/9	12.854
Oct.	7	13,	10/16	12.083
	14	20,	10/23	12.354
	21	27,	10/30	12.75
	28	Nov. 3,	11/6	13.70

[fol. 1091]			Published	Per lb.
Nov.	4	10,	11/13	14.583
	11	17,	11/20	15.688
	18	24,	11/27	16.979
	25	Dec. 1,	12/4	16.70
Dec.	2	8,	12/11	14.383
	9	15,	12/18	14.833
	16	22,	12/25	25.625
	23	29,	1/1/16	15.80
	30	Jan. 5, 1916	1/8	16.—
Jan.	6	12,	1/15	15.75
	13	19,	1/22	17.—
	20	25,	1/29	17.625
	26	Feb. 2,	2/5	17.143
Feb.	3	9,	2/12	17.417
	10	16,	2/19	18.583
Feb.	17	1916 to Feb. 23, 1916	2/26	19.—
	24	Mar. 1,	3/4	18.625

[fol. 1092] DEFENDANT'S EXHIBIT V

Ninth Annual Report of the United States Smelting, Refining and Mining Company for the Year Ending December 31, 1914

United States Smelting, Refining and Mining Company

List of directors, etc., omitted in printing.

[fols. 1093 & 1094] Officers of operating and Affiliated Companies omitted in printing.

[fol. 1095] Ninth Annual Report to the Stockholders of the United States Smelting, Refining and Mining Company

To the Stockholders:

The Board of Directors submits herewith Statement of Earnings of the United States Smelting Refining and Mining Company and its subsidiary companies for the year ending December 31, 1914, together with Consolidated Balance Sheet at that date.

The earnings from operations of all companies for the year 1914 have been as follows:

Consolidated Earnings Statement

Earnings of all companies, after charging Cost of Production, Selling Expense and Repairs, but before providing for Depreciation.....	\$2,932,519.31
Deduct Depreciation, Improvement and Reserve...	666,877.59

Profit for year 1914 as per Balance Sheet... \$2,265,641.72

The Undistributed Surplus, as per previous Balance Sheet, viz.	\$4,478,842.53
And the Net Earnings for the year.....	2,265,641.72

Amounting to \$6,744,484.25

[fol. 1096] Have been applied as follows:

Dividends on Preferred Stock of United States Smelting Refining and Mining Company at 7% per annum.....	\$1,702,221.50
Dividends on Common Stock of United States Smelting Refining and Mining Company at 3% per annum.....	526,671.00
Undistributed Surplus as per Balance Sheet.....	4,515,591.75
	<u>\$6,744,484.25</u>

The metals produced in 1914, including metals from custom ores and the production in Mexico, were as follows:

		Percentage in value of each metal
Copper	17,946,659 lbs.	18.9%
Lead	64,443,260 lbs.	18.9
Silver	9,936,237 ozs.	42.1
Gold	124,719 ozs.	20.1
		<u>100.0%</u>

The average prices at which metals were sold during the year were as follows:

Copper	\$0.13404 per lb.
Lead .....	.03827 per lb.
Silver .....	.55564 per oz.

[fol. 1097] The tonnage of ores produced from Centennial-Eureka, Mammoth, Gold Road, and Bingham Mines, and in Mexico, was 1,011,532 tons, of which the values of the metal contents were in the proportion of 32% copper, 5% lead, 37% silver and 26% gold.

Balance Sheet

The Consolidated Balance Sheet on page 8 sets forth the combined assets and liabilities of the United States Smelting Refining and Mining Company and its subsidiary companies.

Capital Expenditures, 1914:

The charges to Capital Account for construction and other additions to property and investment in 1914 have been as follows:

Investment in Stocks and Bonds of Coal Companies in Utah.....	\$197,499.00
Investment in Stocks of Other Companies.....	165,335.80
Additions to Plant in the United States and in Mexico	340,521.70
Mine Properties and other charges to Capital Account	75,263.47
	<hr/>
	\$778,619.97
Less: Miscellaneous Credits.....	316,047.73
	<hr/>
	\$462,572.24

Current Assets and Liabilities:

The liabilities from one company to another are eliminated in the Consolidated Balance Sheet from both liabilities and assets.

The net current assets of all companies were as follows:

[fol. 1098] Current Assets:

Cash	\$1,255,940.32
Notes Receivable (including \$3,312,262.01 loaned to The Utah Company and its subsidiaries)....	4,360,150.66
Accounts Receivable	1,162,956.17

Inventories—

Metals in Transit, in Process and on Hand.....	\$4,472,246.15
Ores, Matte and By-Products..	1,252,012.13
Supplies, Fuel and Timber...	1,461,779.24
	<hr/>
	7,186,037.52
	<hr/>
	\$13,965,084.67

Less:

Current Liabilities:

Notes Payable (at March 10, 1915, this was reduced to \$800,000)	\$1,600,000.00	
Accounts Payable and Accrued Pay Rolls.....	600,177.54	
Drafts in Transit.....	349,048.02	
Reserves for Freight, Refining Charges, Selling Commission and other purposes.....	747,673.82	
Dividend declared on Preferred Stock (paid January 15, 1915)	425,556.25	
		<u>3,722,455.63</u>

Excess of Current Assets over Current Liabilities.. \$10,242,629.04

[fol. 1099] The total number of preferred stockholders of your company is 8,660 and of common stockholders 2,846 at this date.

General

The year has been one of difficulty in many respects. The European war created a business disturbance which affected materially all departments of the company's activities.

In August it became necessary to materially restrict the output of copper at the Mammoth Mine, and this, coupled with the fall in the price of copper, which fell to 11 cents, substantially interfered with the earnings of this property. The coal operations of The Utah Company were also materially affected, as indicated more in detail below. The same adverse influences were at work to a lesser extent in other directions.

During the latter part of the year your profits were also substantially affected by a drop in the price of silver to a new low level, the average for the last three months being below 50 cents. Profits were also adversely affected by the lower prices of lead.

In April it became necessary for our American Staff to leave Pachuca. Our Mexican Staff continued operations and exhibited a high degree of loyalty, zeal, and intelligence which cannot be too highly praised. But, owing to deficiency in supplies and for other reasons, it became necessary to greatly curtail operations, so that although your Mexican properties were fully maintained and continued in operation on a small scale, nevertheless from May to the [fol. 1100] end of the year these operations sufficed only to pay the expense of keeping the mines unwatered, maintaining the property, conducting exploration and defraying administration expenses without yielding profit. The American Staff returned to Pachuca the latter part of September and since then have been still much hampered by difficulty in obtaining supplies. The daily output of ore daily increased from about 400 tons to a daily average of 570 tons.

in December. The difficulty in obtaining supplies still remains serious, but our Staff has shown great resourcefulness and at the date of this report production has reached 1,400 tons a day as compared with our capacity of 2,000 tons per day. We cannot forecast future Mexican conditions, but if operations can continue to be conducted upon the present scale, the Pachuca Properties can be depended upon for a substantial contribution to the net earnings during the current year even if silver remains at its present low level of 48 cents.

It is a pleasure to note that during all the unsettled conditions in Mexico your properties and employees have always been respected so that there has never been any property damage or interference with your employees.

The Utah Company, all the capital stock of which is owned by your company and to which belong practically all your coal interests and all your railroads serving them, had invested at the close of the fiscal year from the proceeds of the \$10,000,000 notes sold in April, 1912, \$8,374,856.31 in stocks and bonds of coal companies in Utah and in securities of the Utah Railway Company. There remains still unexpended from the proceeds of these notes at the date of this report, \$1,453,143.69. In addition to the amount in [fol. 1101] vested by The Utah Company, the United States Smelting, Refining and Mining Company has invested \$807,786.15 in stocks and bonds of these coal companies and has loaned The Utah Company and its subsidiary companies \$3,312,262.01 for construction, equipment and other requirements. During the year 500 steel coal cars were purchased by The Utah Company.

Construction, equipment and development work at the coal mines were practically completed by the close of the year, and the new railroad as well as the branches to the mines and the side tracks came into operation on November 1, 1914. Your coal properties are, therefore, today thoroughly equipped and have ample capacity for a large increase in output. They have now settled down to a regular operating basis. In 1912 your coal properties produced 620,788 tons; in 1913, 869,522 tons; an increase of 40%. In 1914 owing to large additional contracts concluded in June and July, it was expected that the year would end with a production of well over a million tons, but the war intervened entailing a general curtailment of activity in the region reached by your coal and especially affecting our largest customers, the smelters, mines and railroads. As a consequence the output of 703,936 tons in 1914 showed a decrease of 19% compared with 1913.

If, however, the coal output for the year 1915 should be equal to the coal output for the year 1914, which seems a conservative calculation, the coal properties and railroads should earn for the year 1915 within \$100,000 of fixed charges. If this result can be reached so early in the development of these coal properties upon an estimate [fol. 1102] mated coal production based upon an output of only 703,000 tons, it will be at least reasonably satisfactory. It is true the Smelting Company must look beyond this for a return upon approximately \$4,470,000 which it will have itself invested in the

securities of these companies. But we believe we may look forward in the not distant future, under normal business conditions, to a coal production of 1,500,000 tons. On such a production at present costs and selling prices your company should be earning all fixed charges and at least 6% upon its entire coal investments.

As your railroad investment was only made to get your coal to market and not because your company desired to be interested in railroad operations, your Directors gladly concluded an operating and trackage agreement with the Denver & Rio Grande Railroad (described in the last Annual Report) which became fully effective November 1, 1914. Under this agreement the Denver & Rio Grande Railroad assumes the operation of your railroad property, utilizing those portions parallel to its own tracks as a second track for the purposes of its own traffic as well as for the haulage of your coal. For this privilege your company is to receive satisfactory compensation.

With a view to simplifying the corporate organization, steps have been taken during the year to dissolve the United States Mining Company and the United States Lime Company. Under the new arrangement the Bingham Mines and the Lime Quarries are owned and operated by the United States Smelting Company, all the stock of which is owned by the United States Smelting Refining and Mining Company; and the various stocks in subsidiary companies [fol. 1103] formerly held by the United States Mining Company are now held directly by the United States Smelting Refining and Mining Company.

Your attention is called to the reports of Vice-President Lyon in charge of operation and Vice-President Jennings in charge of exploration and mining investment, which are submitted herewith.

By order of the Board of Directors,

W. G. Sharp, President. March 10, 1915.

[fol. 1104] United States Smelting, Refining and Mining Company and Subsidiary Companies Consolidated Balance Sheet, December 31, 1914

Assets

Cost of Properties:

As per last Balance Sheet.....	\$45,493,484.39
Additions during year 1914.....	462,572.24

Total Capital Assets.....	\$45,956,056.63
Improvements, Options and other Deferred charges	623,272.07
Discount on Gold Notes to be Amortized.....	136,666.62

Current Assets:

Inventories:

Ores, Matte and By-Products	\$1,252,012.13
Supplies, Fuel and Timber	1,461,779.24
	<u>\$2,713,791.37</u>
Metals in Transit, in Process and on Hand	4,472,246.15
Common Stock, 351,115.	
	<u>7,186,037.52</u>
Notes Receivable	4,360,150.66
Accounts Receivable	1,162,956.17
Cash	<u>1,255,940.32</u>

Total Current Assets..... 13,965,084.67

Contingent Liability:

The United States Smelting Refining and Mining Company has guaranteed the \$10,000,000 6% Five Year Collateral Trust Gold Notes, dated April 1, 1912, of The Utah Company.

\$60,681,079.99

[fol. 1105]

Liabilities

Capital Stock of the United States Smelting, Refining and Mining Company

Issued:

Common Stock, 351,115 shares of \$50 each, and Scrip \$137.50	\$17,555,887.50
Less Stock and Scrip in Treas- ury	<u>2,050.00</u>
	\$17,553,837.50
Preferred Stock 486,350 shares of \$50 each, and Scrip \$312.50	24,317,812.50
Less Stock and Scrip in Treas- ury	<u>4,087.50</u>
	24,313,725.00
	<u>\$41,867,562.50</u>

Capital stocks of subsidiary companies not held by United States Smelting Refining and Mining Company (par value).....	1,029,699.25
--	--------------

United States Smelting Refining and Mining Com-
pany four year five per cent gold coupon notes
maturing June 1, 1918:

Authorized \$6,000,000, of which Issued.....	4,000,000.00
--	--------------

Total Capital Liabilities.....	\$46,897,261.75
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Current Liabilities:

Notes Payable	\$1,600,000.00	
Accounts Payable and Accrued Pay Rolls	600,177.54	
Drafts in Transit	349,048.02	
Reserves for Freight, Refining, Sell- ing Commission and other pur- poses	747,673.82	
Dividend declared (paid January 15, 1915)	425,556.25	
		3,722,455.63

[fol. 1106] Depreciation and Reserve Funds:

Depreciation and Reserve Funds of the United States Smelting Refining and Mining Company and Subsidiary Companies ac- cumulated to December 31, 1914	\$5,226,304.01	
Exploration Fund unexpended at December 31, 1914.....	53,242.71	
		5,279,546.72

Undivided Surplus Applicable to Stocks of Sub- sidiary Companies not held by United States Smelting Refining and Mining Company.....	266,224.14
--	------------

Profit and Loss Account:

Balance at December 31, 1913...	\$4,478,842.53
Profits for year 1914.....	2,265,641.72
	<u>\$6,744,484.25</u>

Less:

Dividends on
Stock of United
States Smelting
Refining and
Mining Com-
pany:

Preferred at 7% per annum ..	\$1,702,221.50
Common at 3% per annum ...	526,671.00

2,228,892.50

4,515,591.75

\$60,681,079.99

I certify that the above Balance Sheet of the United States Smelting Refining and Mining Company and its subsidiary companies at December 31, 1914, and the relative Profit and Loss Account, are true and correct statements of the accounts of the consolidated companies at that date.

John Laurie, Comptroller. March 10, 1915.

[fol. 1107]

Boston, Mass., March 10, 1915.

W. G. Sharp,
President United States Smelting Refining
and Mining Company,
55 Congress Street, Boston, Mass.

DEAR SIR:

I hereby beg to submit my report on the operations of the subsidiary companies of the United States Smelting Refining and Mining Company.

1. United States Smelting Company

a. Bingham Mines: Work of exploration was carried on during the year on the No. 1 Tunnel level, No. 2 Tunnel level, and on the 400 level from the Galena shaft. A large amount of work was also done on the Niagara Tunnel level, for the purpose of exploration, and to prepare this level for its intended use as the main haulage level of the whole group of mines. The amount of new ore developed was sufficiently large to maintain unimpaired the ore reserves existing on the first of the year. There were no important new ore bodies found in the Niagara Mine, in which this company holds a majority interest.

The operations of these mines suffered seriously on account of the

large drop in quotations of silver, lead, zinc and copper, all of which in addition to gold, are being produced in these mines. The ore extracted during the year amounted to 92,287 tons of lead ores and 101,655 tons of copper ores. The condition of the mines both as to present ore reserves and future possibilities is excellent.

[fol. 1108] b. Utah Smelter: Improvements were made in almost all the departments of the smelter. The roasting plant was largely improved and increased. The old method of handling ore charges was abandoned and replaced by a mechanical device. This device was developed at the plant and is proving economical and highly satisfactory. Metallurgical costs and work show a marked improvement. Efficiency of the concentrating mill and the Huff Electrostatic Separating Plant has also been improved. These plants, as well as the smelter, operated without material interruption throughout the year.

c. Lime Quarry: There were 116,209 tons of lime rock shipped from the lime quarry. 67,629 tons of this were for the smelter at Midvale, the balance was sold to other parties. The equipment of the lime quarry was improved for the purpose of reducing operating costs.

2. Centennial-Eureka Mining Company

Shipments from the mines of this company show a further decline both in tonnage and grade. The amount extracted during the year was 58,365 tons, all of which came from old, known ore bodies. Development work failed to disclose any new ore chutes. Work is being continued on various promising leads in an endeavor to find new ore bodies.

On Bullion Beck and Champion Mining Company's property, the majority of which is owned by the Centennial-Eureka Mining Company, work of development was continued without any important results. A number of leasers are at work. The ore produced yielded not quite enough profit to cover the expenses on the property. There is considerable promising territory in the mine, the prospecting of which is being continued.

3. United States Stores Company

There is no change to report about the operations of this company.

4. Mammoth Copper Mining Company

The work of opening up existing ore bodies as well as exploring for new ones was continued with satisfactory results. The shipments from the mine amounted to 235,146 tons, which were more than replaced by new finds, leaving the ore reserve larger at the end of the year than it was on the first of the year. On account of the conditions created by the European war, the output of the mine was re-

duced in August to about 65% of normal, and was maintained at about that rate for the balance of the year.

In Section 29 small bodies of very rich ore were found. A new tunnel was run, for the purpose of economic extraction of this ore, and also for the purpose of further development. All the work on Section 29 was stopped in August, to be resumed next spring in case the condition of the copper market warrants it.

In addition to the operations at the Mammoth Mine proper, there were under development in the same vicinity the following properties:

A. Stowell Mine: A fair tonnage of ore was developed with-prospects for additional ore. The property was closed down in Au-[fol. 1110] gust. Operations will be renewed in the spring.

B. Spread Eagle Mine: This property was purchased by the Mammoth Copper Mining Company towards the end of the year 1913. The work of cleaning out old tunnels, and prospecting, was inaugurated early in 1914, but was discontinued in August, for the time being.

C. Anderson Claims: This property consists of a large group of claims within a short distance of the Mammoth Smelter, the ground was acquired by location. Prospecting is being done on it in a small way. Surface indications are favorable. As yet not enough work has been done to demonstrate whether ore exists on these claims.

The Mammoth Smelter operated three furnaces up to August, when operations were reduced to two furnaces. No important changes were made in the equipment or operation of the smelter. The bag-house installation, however, was improved, by replacing the old cooling pipes with a new system of greater capacity. The smelter and baghouse operated satisfactorily throughout the year.

A suit was filed in the United States District Court in California by a group of farmers, claiming violation on the part of the Mammoth Company of a decree under which the company is permitted to operate. No apprehension is felt about the result of this suit, as the provisions of the decree have been conscientiously followed in the operation of the plant.

[fol. 1111] 5. United States Metals Refining Company

The Grasselli Lead Refinery, as a result of improvements inaugurated last year and completed this year, was able to treat a larger tonnage of bullion at reduced cost. A further material increase in the capacity of the refinery is being considered.

The Chrome copper refinery and smelter, on the contrary, suffered a reduction in output, due to the general curtailment of production of copper and copper ores throughout the country.

6. Gold Road Mines Company

The mines produced 107,846 tons, which were treated in the mill of the company. A large amount of development work was done.

There was some profitable ore found, but in general the values have continued low. Prospecting is being continued mainly in the upper levels, with rather indifferent results.

7. The Needles Mining and Smelting Company

Operations of the mill were intermittent on account of insufficient ore supply. Most of the ore treated originated in the Tennessee Mine at Chloride, Arizona, which the company is operating under a bond and lease.

8. Richmond-Eureka Mining Company

No change has taken place in the Richmond-Eureka Mines. They continue idle on account of the failure so far of obtaining satisfactory [fol. 1112] freight rates for the transportation of the ore from the mine to the smelter.

9. Real Del Monte y Pachuca Mines in Mexico

Developments and production in these Mexican mines continued favorably until April, 1914, when the American employees were compelled to leave the country. Upon the return of the American staff in September, the mines were found in perfect condition. A large amount of development work had been done in a perfectly satisfactory manner and new ore bodies had been opened up under the supervision of our Mexican employees. The mine and mills had operated without interruption, though on a much smaller output. The output has, since then, been somewhat increased, but operations still continue on a restricted scale, owing to the difficulty of supplying the mines and mills with cyanide, powder, timber, and other material, due to the European war, and on account of interruption of railroad traffic between Mexico City and the United States border, and later between Mexico City and Vera Cruz.

The results of development work have been most gratifying. All of the eight mines in active operation have maintained or increased their ore reserves. Some ore chutes have been opened up of considerable importance in their present size and their future promise.

In addition to above, exploration in new territory has revealed a vein which we are confident will add materially to the value of the properties.

[fol. 1113] Another new territory which has developed ore and holds out great promise lies to the north of the Dificultad shaft of the Santa Inez vein. The existence of ore in that territory was known before. The grade was too low for profitable extraction, but operating costs have been reduced to such a point that the same ore is now regarded as good milling ore.

Considerable new ground was added last year to the holdings of the company by location and purchase. The La Reunion purchase was mentioned in last year's report of Mr. S. J. Jennings, Vice-President in Charge of Exploration, as being of the most promising

nature. Preliminary work has been done to determine the most suitable way of exploring this ground, and a working plan has been adapted. However, in view of the favorable developments of the year in so many different places, which will require sinking of new shafts and large installations, it is a question whether it will be found advisable to proceed with the opening up of the La Reunion immediately.

In spite of the political disturbances, the additions to the mills have been carried to completion. The mills now have a rated capacity of 60,000 tons per month, but without doubt are capable of exceeding that capacity.

General

The policy of maintaining all the properties in the very best condition has been continued. Every one of them is in a position to resume operations on a normal scale at any time, when the present unfavorable situation has improved. The loyalty and efficiency of our field staff is deserving of the highest praise. I wish especially [fol. 1114] to note the courage and ability with which the management and operating force of the Mexican properties has met every situation. In this respect, the officials of Mexican nationality displayed the same spirit to serve the company as those of American nationality. Neither was the loyalty confined to the higher officials, but included all classes of workmen, down to the lowest. It is due to this spirit that activity continued without a break. Neither was any tendency shown on the part of any political or military leader to do damage to the properties.

Respectfully submitted, Frederick Lyon, Vice-President in Charge of Operation.

Boston, Mass., March 10, 1915.

W. G. Sharp,
President United States Smelting, Refining
and Mining Company,
55 Congress Street, Boston, Mass.

DEAR SIR:

Search for new properties was continued by your Exploration Department with vigor during the year ending December 31, 1914.

The number of properties presented for our consideration amounted to 639. Of these 538 were rejected after an office examination of the reports and data submitted had been made by the office nearest the property offered. A preliminary field examination of 82 was [fol. 1115] made. Nineteen (19) properties were accorded a complete examination.

A good deal of attention was paid to the possibilities of the oil fields in California, Wyoming and Mexico. As a result an interest was acquired in two oil properties and a long option obtained on an interest in a third oil property.

The amount of money involved in the purchase of these interests is not very large, but the possibilities seem attractive.

Two properties were mentioned in the last Annual Report as being under option, on both of which we were doing work. The one in Alaska has not disclosed large enough bodies of sufficient value to warrant our exercising our option, but did disclose enough value to probably recompense us for the work done, should we be forced under the terms of our option to take the property over. On the property in California, the time limit of the option was extended, and we intend doing more work before exercising our rights.

The work of the Exploration Department has been divided up into three districts: Mexico, Pacific Coast, and Inter-Mountain Region. A manager for each district has been appointed, with a General Manager for the whole Department. The new organization, assisted by all the officials of the company, will continue a diligent search for profitable mining investments.

Respectfully submitted, Sidney J. Jennings, Vice-President
in Charge of Exploration and Mining Investment.

[fol. 1116]

DEFENDANTS' EXHIBIT W

Tenth Annual Report of the United States Smelting, Refining and Mining Company for the Year Ending December 31, 1915

United States Smelting, Refining and Mining Company

List of Directors, etc., omitted in printing.

[fols. 1117 & 1118] Officials of Operating and Affiliated companies omitted in printing.

[fol. 1119] Tenth Annual Report to the Stockholders of the United States Smelting, Refining and Mining Company

To the Stockholders:

The Board of Directors submits herewith Statement of Earnings of the United States Smelting, Refining and Mining Company and its subsidiary companies for the year ending December 31, 1915, together with the Consolidated Balance Sheet at that date.

The earnings from operations of all companies for the year 1915 have been as follows:

[fol. 1120]

Consolidated Earnings Statement

Earnings of all companies, after charging Cost of Production, Selling Expenses, Repairs and Interest, but before providing for Depreciation....	\$7,579,184.14
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Deduct:

Depreciation, Improvement and Reserve.....	986,859.85
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Profit for year 1915 as per Balance Sheet.	\$6,592,324.29
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The Undistributed Surplus, as per previous Balance Sheet, viz.	\$4,515,591.75
And the Net Earnings for the year	6,592,324.29

Amounting to	\$11,107,916.04
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Have been applied as follows:

Additional Reserves for Depreciation	\$888,900.00
Dividends on Preferred Stock of United States Smelting Refining and Mining Company at 7% per annum	1,702,225.00
Dividend on Common Stock of United States Smelting, Refining and Mining Company at 75 cents per share	263,336.25
Undistributed Surplus as per Balance Sheet	8,253,454.79
	<u>\$11,107,916.04</u>

[fol. 1121] The metals produced in 1915, including metals from custom ores and the production in Mexico, were as follows:

		Percentage in value of each metal
Copper	26,923,674 lbs.	20.9%
Lead	87,102,179 lbs.	17.6
Zinc	34,105,471 lbs.	19.2
Silver	12,071,863 ozs.	25.4
Gold	196,481 ozs.	16.9
		<u>100.0%</u>

The average prices at which metals were sold during the year were as follows:

Copper	\$0.18183 per lb.
Lead .....	.04546 per lb.
Zinc .....	.14964 per lb.
Silver.....	.49965 per oz.

The tonnage of ores produced from Centennial-Eureka, Mammoth, Gold Road, Tennessee and Bingham Mines, and in Mexico, was 1,066,025 tons, of which the values of the metal contents were in the proportion of 30% copper, 5% lead, 21% zinc, 25% silver and 19% gold.

Balance Sheet

The Consolidated Balance Sheet on page 8 sets forth the com-[fol. 1122] bined assets and liabilities of the United States Smelting Refining and Mining Company and its subsidiary companies.

Capital Expenditures, 1915

The charges to Capital Account for construction and other additions to property and investment in 1915 have been as follows:

Investment in Stocks and Bonds of Coal Companies in Utah	\$50,006.20
Investment in Stocks of Other Companies.....	515,366.48
Additions to plant in the United States and in Mexico	413,023.54
Mine Properties and other charges to Capital Account	80,930.27
Investment in Zinc Smelters and at Zinc Mine in Kansas and Missouri	\$953,597.81
Less: Reserve for Depreciation.....	600,000.00
	<u>353,597.81</u>
	<u><u>\$1,412,924.30</u></u>

Current Assets and Liabilities

The liabilities from one company to another are eliminated in the Consolidated Balance Sheet from both liabilities and assets.

The net current assets of all companies were as follows:

[fol. 1123] Current Assets:

Cash	\$2,482,830.93
Notes Receivable (including \$3,418,611.83 loaned to The Utah Company and its subsidiaries)....	3,867,148.12
Accounts Receivable	1,959,685.54
Inventories—	
Metals in Transit, in Process and on Hand.....	\$6,172,835.89
Ores, Matte and By-Products..	1,287,127.56
Supplies, Fuel and Timber..	1,573,611.27
	<u>9,033,574.72</u>
	<u>\$17,343,239.31</u>

Less:

Current Liabilities:

Accounts Payable and Accrued		
Pay Rolls	\$935,726.68	
Drafts in Transit.....	712,303.80	
Reserves for Freight, Refining,		
Selling Commission and		
other purposes	1,283,225.47	
Dividends declared (paid Jan-		
uary 15, 1916).....	688,892.50	
		3,620,148.45
Excess of Current Assets over Current Liabilities..	\$13,723,090.86	

The total number of preferred stockholders of your company is 8,768 and of common stockholders 2,248 at this date.

[fol. 1124]

General

The past year has been one of great and increasing prosperity for your company. Both the gross and net earnings are the largest in its history. The tremendous demand for metals caused by the European war forced the prices of copper, lead and zinc to advance with great rapidity, and while there were numerous fluctuations, the average value for the year was high. The price of silver towards the end of the year materially advanced.

Owing to the extraordinary increase in the price of spelter, all the zinc smelters of the country were overloaded with ore, and the spread between the price at which zinc ore could be purchased and spelter sold became very great. In order to take advantage of this spread and also to have an outlet for zinc ore produced in our own mines, we acquired three smelters, located respectively at Altoona, Iola and La Harpe, Kansas. A lease was also made of the Ravenswood Mine, near Reeds, Missouri, and a mill of 750 tons daily capacity was erected thereon. These three smelters, together with additions and improvements thereto, and the Ravenswood Mine represent a total investment of \$953,597.81. These smelters have an estimated capacity of 7,500 tons of ore and concentrates per month. \$600,000 was written off this investment out of earnings, and the balance will be written off during 1916.

The output of coal for the year was 707,559 tons as compared with 703,936 tons in 1914. The larger increase anticipated was prevented by two causes,—the decreased demand for coal throughout the territories supplied by your company, and the increased competition of coal producers. In order to promote economy in the [fol. 1125] administration of your coal operations, steps have been taken to consolidate the coal companies which you own into one company, called the United States Fuel Company. It is expected that this consolidation will be completed during the coming year, and it is hoped that the anticipated economies will materially improve the earning powers of your coal operations.

Upon the expiration, in December, 1915, of certain selling agency contracts covering the sale of metal products of some of your subsidiary companies, a Metals Sales Department of the United States Smelting Company was organized to handle this business directly with the customers. This department is under the management of Mr. F. Y. Robertson, who, in his capacity as Vice-President and General Manager of the United States Metals Refining Company, has for some time been in close touch with the selling end of the business.

Since the end of the fiscal year, the company has sold to bankers, at slightly over par, an issue of \$12,000,000 10-year, six per cent convertible gold notes, dated February 1, 1916, payable February 1, 1926, convertible at any time at the option of the holders, into common stock of the United States Smelting Refining and Mining Company, on the basis of \$75 in notes for each share of common stock of the par value of \$50. The notes are callable at 110 and accrued interest on any interest day, but, if so called, may be converted into common stock at any time prior to the date fixed for redemption. Out of the proceeds of these notes and cash on hand it is proposed to retire the \$10,000,000 six per cent 5-year collateral trust gold notes of The Utah Company maturing April 1, 1917, guaranteed by your company, and the \$4,000,000 United States Smelting Refining and Mining Company 4-year five per cent gold notes maturing [fol. 1126] June 1, 1918. The notes of The Utah Company have been called for prior payment and redemption at 101 and accrued interest on April 1, 1916, and the \$4,000,000 United States Smelting Refining and Mining Company notes will be called for prior payment and redemption on June 1, 1916. This financing will result in an interest saving of \$80,000 per annum, and will release the unexpended balance of the proceeds of The Utah Company's notes, amounting to \$1,337,502.37, now held in escrow under the indenture of trust securing The Utah Company's notes.

Your attention is called to the reports of Vice-President Lyon in charge of operations for details of the operating properties, and Vice-President Jennings in charge of exploration and mining investment for an account of the activities of the exploration department. Both of these reports are submitted herewith.

In conclusion, I wish to emphasize my appreciation of the work done by your staff during the past year, especially by the men engaged in the operations in Mexico, who have gone through extraordinarily trying experiences with skill and courage.

By order of the Board of Directors,

W. G. Sharp, President. March 14, 1916.

[fol. 1127] United States Smelting Refining and Mining Company
and Subsidiary Companies

Consolidated Balance Sheet, December 31, 1915

Assets

Cost of Properties (not including The Utah Company's assets):

As per last Balance Sheet.....	\$45,956,056.63
Additions during the year.....	1,412,924.30
Total Capital Assets.....	\$47,368,980.93
Improvements, Options and Other Deferred Charges	635,845.80
Discount on Gold Notes to be Amortized.....	96,666.58

Current Assets:

Inventories—

Ores, Matte and By-Products	\$1,287,127.56
Supplies, Fuel and Timber..	1,573,611.27

\$2,860,738.83

Metals in Transit, in Process and on Hand.....	6,172,835.89
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\$9,033,574.72

Notes Receivable.....	3,867,148.12
Accounts Receivable.....	1,959,685.54
Cash	2,482,830.93

Total Current Assets..... 17,343,239.31

[fol. 1128] Contingent Liability:

The United States Smelting Refining and Mining Company has guaranteed the \$10,000,000 6% Five Year Collateral Trust Gold Notes, dated April 1, 1912, of The Utah Company.

These Notes and the \$4,000,000 of United States Smelting Refining and Mining Company Notes will be called as of April 1 and June 1, 1916, respectively, and will be paid off with the proceeds of an issue of \$12,000,000 6% Convertible Notes of the United States Smelting Refining and Mining Company and with cash on hand. The Utah Company's assets and liabilities will then be incorporated in the Consolidated Balance Sheet.

\$65,444,732.62

Liabilities

Capital Stock of the United States Smelting Refining and Mining Company.

AUTHORIZED:

Common Stock.....	750,000 shares	\$37,500,000.00
Preferred Stock.....	750,000 shares	37,500,000.00
	<u>1,500,000 shares</u>	<u>\$75,000,000.00</u>

[fol. 1129] Issued:

Common Stock, 351,- 115 shares of \$50 each, and Scrip \$137.50.....	\$17,555,887.50
Less: Stock and Scrip in Treasury.	2,050.00
	<u>\$17,553,837.50</u>

Preferred Stock, 486,350 shares of \$50 each and Scrip \$312.50.....	\$24,317,812.50
Less: Stock and Scrip in Treasury.	4,087.50

24,313,725.00
\$41,867,562.50

Capital Stocks of Subsidiary Companies Not Held By United States Smelting Refining and Mining Com- pany (Par Value).....	1,029,699.25
United States Smelting Refining and Mining Com- pany Four Year Five Per Cent Gold Coupon Notes maturing June 1, 1918:	
Authorized \$6,000,000, of which issued.....	<u>4,000,000.00</u>

Total Capital Liabilities..... \$46,897,261.75

Current Liabilities:

Accounts Payable and Accrued Pay Rolls.....	\$935,726.68
Drafts in Transit.....	712,303.80
Reserves for Freight, Refining, Sell- ing Commission and other pur- poses.....	1,283 225.47
Dividends declared (paid January 15, 1916).....	688,892.50
	<u>3,620,148.45</u>

[fol. 1130] Depreciation and Reserve Funds:

Depreciation and Reserve Funds of the United States Smelting Refining and Mining Company and Subsidiary Companies accu- mulated to December 31, 1915..	\$6,289,426.63
Exploration Fund unexpended at December 31, 1915.....	38,371.60
	<u>6,327,789.23</u>

Undivided Surplus Applicable to Stocks of Sub- sidiary Companies not held by United States Smelting Refining and Mining Company.....	346,069.40
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Profit and Loss Accounts:

Balance at December 31, 1914.	\$4,515,591.75
Profits for year 1915.....	6,592,324.29
	<u>\$11,107,916.04</u>

Less:

Additional Reserves for Depreciation..	\$888,900.00		
Dividends on Stock of United States Smelting Refining and Mining Com- pany:			
Preferred at 7% per annum.....	1,702,225.00		
Common at 75 cents per share.....	263,336.25		
	<u>2,854,461.25</u>		
		<u>8,253,454.79</u>	
		<u>\$65,444,732.62</u>	

I certify that the above Balance Sheet of the United States Smelting Refining and Mining Company and its subsidiary companies at December 31, 1915, and the relative Profit and Loss Account, are true and correct statements of the accounts of the consolidated companies at that date.

John Laurie, Comptroller. March 14, 1916.

[fol. 1131]

Boston, Mass., February 21, 1916.

Mr. W. G. Sharp,
President United States Smelting, Refining and Mining Com-
pany,
55 Congress Street, Boston, Mass.

DEAR SIR:

I hereby beg to submit my report on the operations of the subsidiary companies of the United States Smelting, Refining and Mining Company.

1. United States Smelting Company

a. Bingham Mines: The extensive improvements on the Niagara Tunnel level, referred to in last year's report, were continued during the year and carried to completion. The main tunnel and its branches were widened and straightened out; the grades were improved and the track entirely replaced and made to serve heavier loads and higher speeds. This level will be the main haulage level for all the Bingham Mines of the United States Smelting Company and of the Niagara Mining Company. This new haulage system will reduce the cost of ore production and will permit the development of all the mines at greater depth. Considerable of this development was undertaken during the year and demonstrated the continuation of ore deposits to that level, assuring a long life of the mines. The inauguration of the new haulage system will make unnecessary the aerial tramways, the hauling capacity of which was limited, and will allow of a material increase in the output of the Bingham Mines. Pneumatic locomotives were installed to take the place of electric locomotives heretofore used. In the short [fol. 1132] trial they have had the pneumatic locomotives have given such satisfaction that steps are being taken to introduce them in other levels where transportation heretofore has been done by hand power.

Exploration work at depth and on the strike of known ore systems added considerable tonnage to the reserves. A crosscut is being run into the Old Telegraph Ground, from which this mine will be explored at depth, after being practically idle for a number of years. In a similar manner the Niagara Mine, in which this company holds a majority interest, is being explored. Work has not advanced far enough to yield important results, though very favorable indications exist in these territories. The shipments from the United States Smelting Company Mines at Bingham during the year were 94,166 tons of lead ores and 34,313 tons of copper ores.

b. Utah Smelter: Numerous improvements were made at the milling and smelting plant of the United States Smelting Company at Midvale, the most important of which is the enlargement of the capacity of the mill from 350 tons per day to 600 tons per day with a further increase to 675 tons in course of installation; the erection

of a new bag-house, and the addition to the ore roasting department. This latter addition permits of smelting 150 tons more of sulphide ores per day than heretofore. The new baghouse was found necessary to relieve the old baghouse, which was getting insufficient for the increased work done by the smelter. During the year an electrolytic process for the recovery of cadmium from the baghouse dust was developed and is now in successful operation. Other by-[fol. 1133] products, principally white arsenic, are recovered from the baghouse dust and marketed.

c. Lime Quarry: The Lime Quarry produced 130,477 tons of rock with a slight decrease of cost as compared with previous years. About one-half of this output was shipped to the company's smelter at Midvale. The other half was sold to other parties.

d. Zinc Properties: During the year the United States Smelting Company acquired three smelting plants in the State of Kansas, and a lease on the Ravenswood zinc mine in Missouri. The smelting plants are located at Iola, La Harpe and Altoona, and have a combined capacity of 250 tons of ore per day. Gas is used for fuel and they are equipped with all the necessary auxiliaries for the production of spelter. They treat custom ores and concentrates as well as ores and concentrates originating in properties of the United States Smelting Refining and Mining Company. A new mill was erected at the Ravenswood Mine, with a capacity of 750 tons per day. Ore extraction from the mine began at the end of the year, after it had been unwatered and otherwise put into shape for efficient work.

2. Centennial-Eureka Mining Company

Exploration work on various leads in the Centennial-Eureka Mine continued to disclose small tonnages of ore, but no ore bodies of great importance were found. Development work is being carried on wherever indications promise results. Shipments have been uninterrupted throughout the year, and amounted to 49,530 tons. [fol. 1134] In the mine of the Bullion Beck and Champion Mining Company, the majority of which is owned by the Centennial-Eureka Mining Company, development was continued and a small tonnage of zinc ore and of lead ore was extracted by the company and by leasers.

3. United States Stores Company

This company continued its operations in the same manner as heretofore in purchasing materials for all the properties.

4. Mammoth Copper Mining Company

The mine produced 290,473 tons of ore, of which 46,027 tons carried high percentages of zinc. The latter was taken to a sorting plant, constructed at the beginning of the year at the smelting works of the Mammoth Copper Mining Company, where the ore was divided

into two products: One product being zinc ore, that was shipped to the zinc smelters of the company in Kansas, and the other a copper ore, which was smelted on the spot. The most important result of exploration work at the mines was the discovery of a new ore lense outside of the ore zone heretofore followed, and at greater depth than any ore yet found in the mine. The copper contents of the ore in the new lense is much in excess of the average in the Mammoth Mine.

In Section 29, a small amount of ore rich in copper, gold and silver was extracted and shipped to the smelter. Exploration in these outlying workings added to the reserves a moderate amount of ore of equally high grade. The ground looks very promising, and satisfactory results are expected to follow further work.

[fol. 1135] In addition to the Mammoth Mine proper, the Mammoth Copper Mining Company operated the following properties:

A. Stowell Mine: Work was resumed in spring, after an interruption due to the breaking out of the European war, resulting in a moderate increase in the ore reserves. It is the present intention to supply this mine with transportation facilities, whereupon extraction of ore will be inaugurated and the ore shipped to the smelter of the Mammoth Copper Mining Company in Kennett.

B. Spread Eagle: This prospect was also reopened in spring for exploration work, which has been carried on uninterruptedly. No ore has yet been found, but indications continue favorable.

C. Anderson Claims: The Anderson Claims were acquired by the Mammoth Copper Mining Company by location and were explored on a moderate scale. No important ore bodies of pay grade have yet been found, though a zone of low-grade copper ore was recently encountered from which a small amount of pay ore was sorted out for shipment to the smelter. This find justifies expectations for more important developments in the future.

D. The Friday Lowden Mine: This is also a recent acquisition of the Mammoth Copper Mining Company and is located directly south of it. When purchased this mine contained a small amount of ore, which was all shipped to the smelter. Development of this promising territory was started in November. This development at [fol. 1136] the present time consists of a tunnel, which is being run towards the ore zone of the Mammoth Mine, and will cut it at a depth of 400 feet below the No. 5 Tunnel, which is the lowest tunnel of the Mammoth Mine. The distance to be run to reach the Mammoth ore zone is 4,000 feet. Incidentally this tunnel will crosscut the country and form a basis for the exploration of the Friday Lowden territory. Full equipment for this work has been provided.

Smelter: Three furnaces continued to operate throughout the year. No important changes or additions were made at the smelter with the exception of the zinc sorting plant already mentioned. The suit mentioned in last year's report as having been filed in the

United States District Court in California by farmers claiming violation on the part of the Mammoth Company of a decree under which the Company is permitted to operate, resulted, as anticipated, in a decision entirely favorable to the Mammoth Company.

5. United States Metals Refining Company

The Grasselli Lead Refinery, besides making various improvements in the existing equipment, increased its capacity 25%.

The Chrome Copper Refinery continued its betterment, especially in the boiler plant, and was brought up to a high degree of efficiency. At the same time its capacity was increased 10%.

Both the refineries operated without interruption throughout the year.

[fol. 1137]

6. Gold Road Mines Company

The production of the mine during the year was 96,272 tons. Development work resulted in the opening up of ore chutes not very large in tonnage but of higher grade than the average heretofore mined by this company. The ore was treated in the mill. No important changes or additions were made on the property. An interior shaft was started and will be sunk to a depth of 600 feet below the 900-foot level to explore the mine in greater depth.

7. The Needles Mining and Smelting Company

The mill at the Needles operated throughout the year at full capacity. A flotation plant was added for the recovery of zinc values in the tailings. The mill, including the flotation plant, made a good record in costs and recoveries. Nearly all the 47,897 tons of ore treated at the mill came from the Tennessee Mine at Chloride, which is operated by this company under a lease and bond. Stopping in this mine was carried on to a depth of 1,170 feet. At that depth the ore continues of good grade and fair size. The high percentage of zinc contained in this ore makes it quite profitable at this time. The main shaft was sunk to below the 1,400-foot level, and a crosscut is being started on the 1,400-foot level to cut the vein. It is expected that the ore chute will continue to that depth, in which case an important tonnage will be added to the existing ore reserve.

[fol. 1138]

8. Richmond-Eureka Mining Company

A very small amount of work was done at the mines. The railroad situation, which prevents operations on a large scale, and which was described in last year's report, has not improved.

9. Real Del Monte y Pachuca Mines in Mexico

In spite of the numerous difficulties incidental to and resulting from the political disturbances in Mexico, the work at these prop-

erties was carried on almost uninterruptedly. The main obstacle that the management had to overcome was the lack of transportation facilities, which still continues, making it difficult to obtain supplies, including provisions. However, through the capable efforts of the management and the assistance of the Mexican authorities it has been possible to operate the mills at 50% to 80% of their capacity.

In the second half of the year a violent epidemic of typhus broke out which added a new problem to the situation. This epidemic appears to be now rapidly on the decline.

In spite of the serious handicaps, the development of the mines was continued on a large scale. The most noteworthy results were obtained in a vein not heretofore explored by this company. As far as developed, this vein shows unusually high values. A large tonnage of ore has been put in sight. This ore was encountered at a depth of about 1,400 feet below the surface, which, together with other features of the find, justify very high expectations of profits from this source.

All the old mines continued their regular output, each of them maintaining its ore reserve. Some of the exploration work in the old mines yielded results of considerable importance.

[fol. 1139] Extensive new territory was acquired during the year and its exploration was inaugurated. In the very promising territory purchased in the previous year some progress was made towards opening up the ground. None of the new territory received the attention which it would have had if the developments in the old territory had not been so successful. It was considered good policy, under the circumstances, to use all the available supplies of material and labor on the old mines. It is intended with the return of normal conditions to prosecute with vigor the opening up of new territory.

General

As in the past, it has been the endeavor to maintain all properties in the very best condition. The loyalty of the operating staff and the mutual support of all individual members have continued to contribute to the success of the operations. It is only fair to emphasize the devotion to duty and energy displayed under most adverse conditions by the management and officials of the Mexican properties, natives and foreigners alike, and to recognize the endeavor of the Mexican authorities to extend all the aid in their power.

Respectfully submitted, Frederick Lyon, Vice-President in Charge of Operation.

[fol. 1140]

Boston, Mass., March 14, 1916.

Mr. W. G. Sharp,
President United States Smelting Refining
and Mining Company,
55 Congress Street, Boston, Mass.

DEAR SIR:

The work of your exploration department was continued with energy during the year ending December 31, 1915.

The number of properties offered for our consideration was again large, amounting to 786. Of these 655 were not deemed worthy of further investigation after the data submitted had been considered by the office nearest the property offered. A preliminary field examination was made of 118 and a complete examination was made of 13.

Three zinc smelters were acquired; a lease was taken on a zinc property near Reeds, Missouri, and a mill, with a capacity of 750 tons a day, erected thereon. A minority interest was acquired in an alunite property from which both potash and alumina will be produced. A lease of a large number of claims in Leadville was taken and the work of unwatering and developing these claims was started early in the present year.

Development work on the property in Alaska, mentioned in the last annual report, was continued. An action was started by some of the former bondholders to dispossess us of this property, but so far no final decision has been arrived at by the courts.

Work is also being continued on the property in California. No decision has yet been made as to our exercising our option.

All the officials of the company have assisted in the work of the [fol. 1141] Exploration Department, and it is expected that the energetic work of the Department, with such continued assistance, will find new and profitable mining investments.

Respectfully submitted, Sidney J. Jennings, Vice-President
in Charge of Exploration and Mining Investment.

DEFENDANTS' EXHIBIT X

The American Metal Company, Ltd., of New York
825 A. C. Foster Building
Denver, Colorado

March 29th, 1915.

The American Metal Company, Limited,
61 Broadway, New York City.

DEAR SIRS:

United States Smelting Company

Enclosed please find copy of their letter dated Salt Lake, the 25th inst.

The contract which then clearly provides that the Kennett product is to be included, and we are therefore entitled to these shipments without making any payment for the copper, as the contract does not provide for copper. The question, however, is whether we should stand on our contract in this instance, as in that event, the combined Midvale and Kennett shipments would no doubt amount to the maximum of 500 tons, which we would have to take over commencing with the first of June, in addition to the 1,200 tons covered by the Needles contract. Under the circumstances, we deem [fol. 1142] it best not to answer the letter from the U. S. Company, so that you may have an opportunity to pass on this matter, and wire us on receipt of this letter.

Very truly yours, The American Metal Company, Ltd.
MS/MSW.

DEFENDANTS' EXHIBIT Y

The American Metal Company, Ltd., of New York

825 A. C. Foster Building

Denver, Colorado

April 1, 1915.

The American Metal Company, Limited,
61 Broadway, New York City.

DEAR SIRs:

United States Smelting Company

In accordance with your two day letters on this subject, we are writing them to-day as per enclosed copy.

We thought it best not to touch upon the question of our being entitled to the Kennett ores. If the situation should at any time change so that we should want these ores, we can take the position that we only just then discovered that the U. S. contract specifically covers Kennett.

Very truly yours, The American Metal Company, Ltd.
MS/MSW.

[fol. 1143]

DEFENDANTS' EXHIBIT "Z"

In June, 1914

Mr. Putzel's Telegram to New York in Reporting Negotiations

Kennett reported to you from Los Angeles last March material is crude carrying precious metal values and 1½ copper for which no payment. Production small for present.

DEFENDANTS' EXHIBIT A1

Think can close with Eardley output of Midvale Table product and Kennett crude for two (2) or three (3) years at Needles terms please wire whether satisfactory and for what period.

June, 1914.

Telegram from Putzel to New York.

[fol. 1144] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

STIPULATION AS TO PROOFS

It is hereby stipulated between the parties hereto, for the purposes of this appeal only, that the defendants below admit the sufficiency of the proof introduced by the plaintiff below as to the following matters:

1. That the total production of zinc crude ore, running not less than 33% metallic zinc, shipped by the Mammoth Copper Mining Company from its properties in Shasta County, California, between April, 1915 and February 28, 1916, was 9,148.257 tons; that said ore constituted all the zinc crude ore running not less than 33% zinc which was produced by the Mammoth Copper Mining Company at its properties in Shasta County, California, between April, 1915 and February 28, 1916; the dates upon which each shipment of such zinc crude ore running not less than 33% metallic zinc was made by the Mammoth Copper Mining Company from Kennett, California, and the assay and analysis of each such shipment lot; that the total [fol. 1145] gross value of said zinc crude ore running not less than 33% zinc computed under the terms of the contract of August 26th, 1914, between the Mammoth Copper Mining Company and Beer, Sondheimer & Company without deductions for freight (which Beer, Sondheimer & Company would have paid for the account of the Mammoth Copper Mining Co.) was \$633,437.67; that the freight which Beer, Sondheimer & Company, had they accepted the ore under the contract of August 26, 1914, would have paid upon the said shipments of ore for the account of the Mammoth Copper Mining Company, (computed upon the foregoing gross valuation of said ore) would have been \$148,478.90.

2. That settlement sheets were prepared by the United States Smelting Company and transmitted to the Mammoth Copper Mining Company, showing the quantity and metallic content of each shipment of the ore above mentioned, as ascertained by the United States Smelting Company, and the settlement price of each such shipment, based upon the terms stated in Plaintiff's Exhibit No. 67;

that voucher drafts were drawn by the United States Smelting Company on the Boston office of the United States Smelting, Refining & Mining Co. in favor of the Mammoth Copper Mining Company for the aggregate amount of \$331,638.96, by way of settlement for the ore above mentioned, and such vouchers were correctly entered into the books of the United States Smelting, Refining & Mining Co. at Boston, so as to credit the Mammoth Copper Mining Company and to debit the United States Smelting Co. respectively; that [fol. 1146] the United States Smelting Co. expended for the account of the Mammoth Copper Mining Company for freight for the transportation of the ore from Kennett to Altoona and from Kennett to Iola the sum of \$106,277.40, which sum was credited to the United States Smelting Co. and debited to the Mammoth Copper Mining Co. on the books of the United States Smelting, Refining & Mining Co. at Boston; that the net amount debited to the United States Smelting Co. and credited to the Mammoth Copper Mining Co. as aforesaid in connection with said ore was \$225,361.56.

3. That the Mammoth Copper Mining Co. kept at Kennett, detailed records of the quantity, assay and analysis of such ore as produced and shipped, and the United States Smelting Co. kept detailed records of the quantity, assay and analysis of such ore received, and that in each case such records were in substantially the same form as were kept with reference to other ores which were involved in transactions with outside concerns.

4. The following exhibits, properly authenticated, were introduced before the Master:

Exhibit number.	Nature of subject matter.
9.	Compilation of tariffs.
10.	Tariff references.
13.	Ore received book No. 1.
14.	Ore received book No. 2.
15.	Ore purchase book.
13-a-b-c-d & f 14-a-13aa.	Sheets from above ore books (seven sheets in a roll).
16.	Statement of ore shipped to Bartlesville, containing Mammoth Company settlement sheets and U. S. settlement sheets attached.
[fol. 1147]	
17-a to 17-z (both inclusive).	Weighmaster's reports covering lots 35 to 66, shipped to Bartlesville.
18-a to 18-f, both inclusive.	Sheet showing composite assays covering lots 35 to 86 shipped to Bartlesville and afterwards to Altoona.
18-1 to 18-5, both inclusive.	Summary showing composite assays of zinc ore shipments shipped to Bartlesville and afterwards shipped to Altoona.
19-a to 19-b.	Assayer's record books kept at Kennett, California.
20-1 to 20-7, both inclusive.	Pages of the metal price book for the months from March, 1915 to and including April, 1916.

21. Statement of zinc ore produced and put in stock and afterwards shipped to U. S. S. Co. at Altoona containing Mammoth Company settlement sheets and also U. S. Co. settlement sheets.
- 22-1 to 22-70, both inclusive. Weighmaster's reports covering Kennett plant lots 23 to 111, both inclusive, which are shown on Plaintiff's Exhibit 21, and which went to stock pile.
23. Statement of zinc ore shipped direct to U. S. Smelting Co. up to and including February 26, 1916, with Mammoth Co. settlement sheets attached and also with U. S. S. Co. settlement sheets attached.
- [fol. 1148]
- 24-1 to 24-98. Weighmaster's reports covering lots 1 to 146 shipped to Altoona.
- 25-a to 25-p, both inclusive. Summary showing composite assays of zinc ore shipments shipped direct to U. S. Smelting Co.
- 25-1 to 25-15, both inclusive. Sheets showing composite assays and average assays of ore taken from Bins "C" and "D," covering lots 1 to 146, shipped to U. S. S. Co. at Altoona and lots 1 to 6, shipped to Iola.
- 26-1 to 26-6, both inclusive. Weighmaster's reports for lots 1 to 6 shipped to Iola.
- 27-1 and 27-2. Statement of estimated freights that were deducted from Mammoth settlement sheets.
- 28-1 and 28-2. Statement of separate freight payments that were deducted from U. S. S. Co. settlement sheets.
29. Statement of amount claimed to be due Mammoth Company from B. S. & Co., inclusive of interest.
30. Amounts received for residue from zinc ore shipments to U. S. Smelting Co. to February 26, 1916.
- 31-1 to 31-32, both inclusive. Ore shipped under contract to B. S. & Co. and received and paid for by them (returned to court).
- [fol. 1149]
- 32-1 to 32-9, both inclusive. Summary of data pertaining to zinc ore produced by sorting plant and shipped March 12, 1915 to February 26, 1916, according to weighmaster's daily reports.
33. Product to Bin "C"—corrected statements of lots 23, 24 and 25.
- 34-1 to 34-32, both inclusive. Memorandum from Southern Pacific or bill of lading covering lots of ore shipped from Kennett to Bartlesville.

- 35-1 to 35-46, both inclusive. Memorandum from Southern Pacific or bill of lading covering lots shipped to Altoona ex-stock pile.
- 36-1 to 36-100, both inclusive. Memorandum from Southern Pacific or bill of lading covering certain lots shipped to Altoona, Kansas.
- 37-1 to 37-6, both inclusive. Memorandum from Southern Pacific or bill of lading covering lots 1 to 6 shipped to Iola.
- 38-1 to 38-5, both inclusive. Assay books offered in evidence in connection with the testimony of J. A. Leslie—numbers 3 and 5 were kept by Leslie's assistant, Kindleberger.
- 39-1—39-4, both inclusive. Analytical day books offered in evidence in connection with the testimony of Otto J. Malitz.
- 39-5. Kindleberger's analytical day books (see Min. before master, page 647-a).
40. Memorandum of contract of resale.
- [fol. 1150]
- 41-1 to 41-29. Assay certificates from Iola (introduced in Curtis deposition) Book #12.
- 42-1 to 42-64. Other reports made from Iola during period in question. (Iola Laboratory reports.)
- 43-1 to 43-65. Sheets of books labelled Altoona Laboratory reports September 12, 1915 to November 30, 1915.
- 44-1 to 44-5. Book 12 (other laboratory reports signed by Olmstead).
- 45-1 to 45-53. Laboratory reports in Book 13.
46. Iola Laboratory Reports (Book 14) (Renner's de.).
47. Iola Laboratory Reports, Book 15.
- 48-a to 48-f. Assay reports sent in by Renner.
49. Book 12.
50. Central Book.
- 100—A-C. Sheets as to contents of bins C and D.
- 101 A-E. Weights and analysis of product going into bins Apl. to July, 1915.
102. Weights and analysis of product from stock piles 2 and 3.
- 103—A-F. Weights and analysis of product from August, 1915 to Jan., 1916.
104. Tabulation by Mr. Metcalf of metal values of ore from Kennett to Bartlesville.

[fol. 1151]

- 105-1 to 105-132 Settlement sheets.
- Ident.

- 106-1 to 106-27 Ident. Settlement sheets for zinc residues to U. S. S. R. & M. Co.
- 107-1 to 107-66 Ident. Weight certificates.
- 108-1 to 108-145 Ident. Original bills of lading for ore shipped from Kennett to Altoona.
- 109-1 to 109-6. Original settlement sheets for residues shipped to Chrome, N. J.
110. Statement of various ores purchased showing amount shipper would receive on 14¢ spelter market, etc., from 7/21/15 to 2/26/16.
111. Original contracts covered by Ex. 110.
112. Statement of Eardley showing comparison of smelting margin on ores bought by U. S. S. Co. during 1915, etc.
113. Original contracts and papers attached, between Consolidated Callahan Mining Co. and U. S. R. & M. Co.
- 114-1 to 114-14. Correspondence showing offers made by U. S. S. Co., during 1915 to shippers for zinc ores.
115. Comparison by Eardley from facts and figures shown in deposition of E. Anderson, between price which would have been received by Mammoth when spelter at 14¢ and 40% zinc and that rec'd by shipper selling ore to U. S. R. M. Co.
- [fol. 1152]
116. Letter from H. Lyne, Mgr. of Amer. S. & R. Co. to Eardley, dated Sep. 30/15 in re zinc residues.
117. Statement of clearing a/c vouchers passing between U. S. S. Co. and Mammoth.
- 118-1 to 118-31. Packages of clearing a/c vouchers.
119. Statement of so-called quotational loss or gain on spelter content in zinc ores produced by U. S. S. Co.
120. Tabulation by Metcalf reconciling statement in Ex. 117 with Ex. 98.
- 121-1 to 121-18. Tabulation by Metcalf showing manner of arriving at deductions for concentrates.
122. Tabulation by Metcalf in re lot 45 to Bartlesville.
123. Tabulation by Metcalf of amount claimed to be due from B. S. & Co. (without interest).
124. Tabulation by Metcalf of time required by U. S. S. Co. to make payments on ore received from Mammoth.
125. Same for B. S. & Co., on ore rec'd and paid for.

126-1 to 126-11.

Tabulation by Metcalf of interest due from
B. S. Co. at 6% to Apr. 1, 1920.

[fol. 1153]

127.

Stipulation dated, March 9, 1921, referring to certain actions brought by the Mammoth Copper Mining Co. against Beer-Sondheimer & Co., Inc., in the State of Utah, and a certain action brought by the plaintiff against Beer-Sondheimer & Co., Inc., and others in the Supreme Court of the State of New York, County of New York.

with certain exceptions the exhibits enumerated above are omitted from the transcript of record, because they relate to the matters covered by the foregoing stipulation.

5. That Exhibit 118 was introduced at the hearings before the Master over the objection of the defendants and exception taken at the time, and nothing herein contained will be deemed a waiver of the said objection and exception.

6. That on or about October 31, 1918, prior to the commencement of this action, plaintiff filed with the Alien Property Custodian a notice of claim for the amount of \$272,824.88; that on or about March 11, 1921, after the close of the hearings before the Master, plaintiff filed with the Alien Property Custodian a paper described as an "amended claim" in the amount of \$302,000; that the Alien Property Custodian thereupon advised the plaintiff that the said paper would not be accepted as an amendment to the original claim as of October 31, 1918, but that the same might be filed as a new and independent claim.

[fol. 1154] 7. That although separate appeals to the Circuit Court of Appeals for the Second Circuit by the plaintiff and the government defendants have heretofore been allowed, there is no necessity for more than one transcript of record to be prepared and filed as a return to both said allowances of appeal in said Circuit Court of Appeals, and accordingly that but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said allowances of appeal, and said single transcript may be used by each of the parties in said Circuit Court of Appeals on their respective appeals.

8. That separate briefs on each appeal need not be prepared and that the argument on both said appeals may be heard by said Circuit Court of Appeals at the same time.

Dated, New York, May 12, 1922.

Stockton & Stockton, Attorneys for Plaintiff. William Hayward, Attorney for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, by Harland B. Tibbetts, of Counsel.

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[fol. 1155] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Dated, New York, July 20, 1922.

Stockton & Stockton, Attorneys for Plaintiff. William Haywood, Attorney for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America.

[fol. 1156] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

Ore Shipped under Contract to Beer, Sondheimer & Co.

CLERK'S CERTIFICATE

I, Alex Gilchrist, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the two foregoing volumes containing 1,156 printed pages is a correct transcript of the record of said District Court in the cause entitled Frederick Y. Robertson, Plaintiff, against Thomas W. Miller, as Alien Property Custodian, Frank White, as Treasurer of the United States of America. Nathan Sondheimer, Albert Sondheimer, Leo [fol. 1157] Wershner, Ludwig Beer and Emil Beer, co-partners, doing business under the firm name and style of Beer, Sondheimer & Company, Defendants, on the appeal by the government defendants, and the cross appeal by the plaintiff as agreed upon by the parties.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office this 25th day of July, 1922.

Alex. Gilchrist, Clerk.

[fol. 1157a] AT A JULY TERM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, THE SECOND CIRCUIT, HELD AT THE UNITED STATES DISTRICT COURT ROOMS, AT NO. 233 BROADWAY, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 25TH DAY OF JULY, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-TWO

Present: Hon. August N. Hand, District Judge.

[Title omitted]

STIPULATION AND ORDER RE TESTIMONY

On the annexed stipulation, it is

Ordered that the testimony may be printed in question and answer form, and the transcript of record, as prepared and agreed upon by the attorneys for the respective parties, be and the same hereby is approved.

Augustus N. Hand, U. S. D. J.

[fol. 1157b] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

It is stipulated by and between the attorneys for the respective parties on the appeal herein that the provisions of Equity Rule 75 of the Rules of the Supreme Court of the United States be and the same hereby are waived; and it is further

Stipulated and agreed that the testimony in the above-entitled case may be printed in question and answer form in the transcript of record, and that an order to this effect may be entered without further notice to either party.

Dated, N. Y., July 24, 1922.

Stockton & Stockton, Attorneys for Frederick Y. Robertson.
William Hayward, Attorney for Thomas W. Miller, as
Alien Property Custodian, and Frank White, as Treasurer
of the United States of America.

[fol. 1158] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1922

No. 94

Argued December 5, 1922. Decided December 28, 1922

[Title omitted]

Before Hough, Manton, and Mayer, Circuit Judges

OPINION

Appeal from the United States District Court for the Southern District of New York. Suit in equity to recover for a debt under §9 of the Trading with the Enemy Act (40 Stat., 419). Decree for plaintiff; plaintiff and defendants appeal. Modified and affirmed.

[fol. 1159] Stockton & Stockton, Esqs., Solicitors for Plaintiff-Appellant-Appellee;

Chas. W. Stockton, Esq., K. E. Stockton, Esq., Alfred Sutro, Esq., of Counsel.

William Hayward, United States Attorney;

Adna R. Johnson, Jr., Esq., Dean Hill Stanley, Esq., Lindley M. Garrison, Esq., Special Assistants to the Attorney General, Solicitors for Defendants-Appellees.

MANTON, Circuit Judge:

We shall refer to the respective parties herein as plaintiff and defendants.

Plaintiff, as assignee of the Mammoth Copper Mining Company of Maine, sued in equity to establish a debt claimed by him and to order the delivery by the defendant, Thomas W. Miller, as Alien Property Custodian, to the plaintiff, of so much of said money and property of the alien enemies herein mentioned as may be necessary to satisfy and discharge said debt with interest thereon and costs. The Alien Property Custodian and the Treasurer of the United States are made parties defendant, as are Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer who are non-resident alien enemies. The suit is based on §9 of the Trading with the Enemy Act (40 Stat., 419) and seeks to recover a debt for breach of a commercial contract. The defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, all resided at Frankfort, Germany, and during the war and before this suit was instituted, their property was seized as alien enemies. A trial was had of the issues raised by the pleadings, and thereafter a Special Master found the amount of the debt. His report has been approved by the court and this appeal is taken from the final decree entered thereon. The decree be-

low establishes that the German defendants did wrongfully breach [fol. 1160] their contract, and the indebtedness due to the plaintiff has been fixed at \$257,597.21 with interest amounting to \$31,800 and the costs of the action.

The indebtedness arose because of a breach of a contract dated August 26th, 1914, but executed on September 29th, 1914. By its terms, Beer, Sondheimer & Company agreed to buy the total production of zinc, crude ore, shipped by the seller from its properties in Shasta County, California. The Mammoth Company was a going concern and owned a producing mine in Shasta County. The price fixed was governed by the St. Louis price of spelter, which was five dollars per hundredweight, the buyer under the contract to pay nineteen dollars a ton for the zinc ore and for each rise of one cent in the price of spelter above five dollars per hundredweight, a credit of five cents per ton was to be allowed, while for each drop, a debit of five cents per ton was to be made. Quotations were made in the Engineering & Mining Journal for the week of the date of the bill of lading. Provision was made for extra payment of ore containing more than forty per cent zinc and also payment for other valuable metals in the ore. Sampling and assaying the ore was fixed by the terms of the contract. It was to continue for one year from the date of the completion of the picking plant. The company contemplated building such a picking plant. In any event, the contract was not to continue for more than eighteen months from the date of its execution. The picking plant was completed March 5, 1915, and the first shipment thereafter was made on March 6, 1915, and up to March 11, 1915, the Mammoth Company had produced and shipped 1,448,382 tons of ore for which payment was made at the contract price. The court below found that the Mammoth Company performed the conditions of the contract to be performed by it, and that Beer, Sondheimer & Company repudiated the contract and breached the same. It was found that the required shipments were in as nearly equal weekly quantities as possible. The repudiation was on the sole ground of an alleged abnormal condition or a claim of a condition arising releasing it from performance on the vis major clause of the contract. It was found below that there was no vis major and that there were no objections to deliveries on the [fol. 1161] ground that they were not in as near as possible equal weekly quantities. It was found by the master that the assay of the ore was fair and accurate and was reasonably applied by the plaintiff in his calculation in the amount of his claim; also that the price by the Mammoth Company on the resale of the ore was the best price obtainable in the market.

The first question presented is whether the plaintiff's claim for breach of this commercial contract is a debt within the meaning of the Trading with the Enemy Act. Section 9 of the Act provides:

"That any person, not an enemy, or ally of the enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing

from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require: * * * If the President shall not so order (payment) * * * said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, title or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest right or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in [fol. 1162] this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment * * * or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated."

The damage resulting from the breach of a commercial contract is a debt. It has been so held under statutes for attachments against "debtors" or suits founded on "debts or indebtedness." (Fisher vs. Consequa, 9 Fed. Cases, 4816; New Haven Co. vs. Fowler, 28 Conn. 103; Showen vs. J. L. Owens Co., 158 Mich. 321.) Where the term "debt" is used under the National Bankruptcy Act (§63 providing debts founded upon an open contract or upon a contract expressed or implied), it has been held that a claim for breach of a commercial contract is a debt as in *In re Frederick L. Grant Shoe Co.* (130 Fed. 881). This court held that a claim for damages against a bankrupt for breach of warranty accompanying a sale of shoes, was a debt provable against his estate. Also, a breach of contract to supply ice gives rise to a debt provable in bankruptcy (*In re Stern*, 116 Fed. 604; see also, *Central Trust Co. vs. Chicago Asso.*, 240 U. S. 581; *Clarke vs. Rogers*, 228 U. S. 534; *In re Mullings Clothing Co.*, 238 Fed. 58.) Under the corporation laws of the states making individual members of a corporation liable for its debts, an unliquidated claim for damages against a manufacturing corporation has been held to be a debt.

"We do not think it admits of a reasonable doubt that all such claims for damages were intended to be included in the term 'debts.'" (*Mill Dam Foundry vs. Hovey*, 38 Mass., 417.)

(See also: *Proctor-Gamble Co. vs. Warren Cotton Oil Co.*, 180 Fed. 543; *Green vs. Easton*, 74 Hun. 329, 26 N. Y. Supp. 553.) In *Fisher vs. Consequa* (supra), Justice Washington said:

"The uncertainty of the sum does not, in the common understanding of mankind, render it less a debt. A promise, whether [fol. 1163] express or implied, to pay as much as certain goods or

labor are worth, or as much as the same kind of goods may sell for on a certain day on a certain market, or to pay the difference between the value of one kind of goods and another, creates in common parlance a debt.'"

Also in the statutes regulating "set-offs." (Jackson vs. Bell, 31 N. J. E. 554; Baum vs. Tomkin, 110 Pa. St. 569; Tompkins vs. Augusta etc. R. Co., 102 Ga. 436.) Also probate statutes. (Johnson vs. Garner, 233 Fed. 756.) Also fraudulent conveyances. (Woodbury et al. vs. Sparrell Print et al., 187 Mass. 426.)

When Beer Sondheimer & Company refused to accept and pay for the quantities of ore according to its metallic content, the ore was sold for less than the contract price. This was the best obtainable price as found below. The metallic content of the ore was known as soon as the assays were made. The price was determined by the quotations in the Engineering & Mining Journal and was fixed and definite. The law fixed the damages to plaintiff as the difference between the contract price and the resale price. Thus the calculation was made and this was found by the master on no materially disputed fact. It was merely subtracting from the amount which Beer, Sondheimer & Company should have paid for the ore, the amount realized by the Mammoth Company on its resale.

Such an indebtedness is what has been called "practically a liquidated amount." (Pratt vs. Auto Spring Repair Co., 196 Fed. 495; Chicago etc. Ry. Co. vs. Clark, 92 Fed. 968.) The contract specified that Beer, Sondheimer & Company were to take the total production of zinc ore at a specified grade over a definite period of time. In United States vs. Colt. (25 Fed. Cases No. 14839 p. 581), Circuit Justice Washington said that a sum may be liquidated so as to support an action of debt although it is not fixed in the amount by the contract itself. If the amount is definitely determined by extrinsic circumstances, the sum is liquidated and certain. The Su-[fol. 1164] preme Court said in United States vs. Chamberlain (219 U. S. 25):

"Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to a certainty."

We think the claim here is for a sum certain, such as would form the basis of a suit for debt. Actions for debt will always lie where the amount sought to be recovered is certain or can be ascertained from fixed data by computation. (Mills vs. Scott, 99 U. S. 25.) We think it was not the intention of Congress to place the duty upon the courts of determining the fact of liability without at the same time imposing the duty of finding the extent thereof. They are nearly related and once liability is found, the task of finding the extent thereof is not ordinarily difficult. When Beer, Sondheimer & Company breached the contract and damages were suffered, a debt was created such as is within the purview of §9 and by virtue of the statute a creditor is entitled to the relief sought.

The defendants seek to avoid the obligations of the contract contending, that it lacks mutuality and is unenforceable for want of consideration. The reason advanced for failing to live up to the terms of the contract was given by Beer, Sondheimer & Company in its telegram of March 17, 1915, wherein it said that:

"In view of abnormal conditions (business) we will only accept tonnages reasonably equal to the average monthly amount shipped heretofore. We are unable to receive and smelt any further tonnages in accordance with page five of our contract with you. We have advised all other shippers accordingly."

Clause 5 referred to was the vis major clause common to business contracts. No vis major existed which would excuse performance of [fol. 1165] a valid contract. It was the abnormal conditions which were given as a reason for breaking their contract. Nothing was said then or since, until this appeal about lack of mutuality. *Grimwood vs. Munson S. S. Line* (249 Fed. 722; 273 Fed. 166) is relied upon in support of the contention that the contract lacks mutuality. It was held in that case that having, at the time of the breach, definitely assigned one reason for the action the defendant could not after defend on a different ground, i. e. lack of mutuality.

By the contract, the Mammoth Company promised to sell, and Beer, Sondheimer & Company promised to buy at a fixed price the total production over a definite period of a specified mine owned and operated by the Mammoth Company. For these mutual promises there is ample consideration. In *Transcontinental Petroleum Co. vs. Interocean Oil Co.* (262 Fed. 278) a provision for deliveries in quantities of actual production of oil wells was deemed sufficient when attacked for want of mutuality. The court said:

"In effect, the contract bound the plaintiff to deliver the entire output of its wells up to the quantities specified. No such personal choice or option was given to withhold or refuse deliveries of oil produced by its wells as is sometimes held to destroy the requisite mutuality of contract obligations. The limitation is a physical one of a kind common in business affairs. When the quantity of a commodity to be delivered or received under a contract of sale rests in the uncontrolled will or desire of one of the parties, mutuality is lacking. It is otherwise when the quantity is measured by the output or requirements of an established plant or business during a limited time."

Where the certainity can be ascertained from the means to be supplied by the future exercise of the business in good faith and in the normal manner of such business, such a commercial transaction does not lack mutuality. (*Marx vs. Amer. Malting Co.*, 169 Fed. 582.) This principal has been applied to the contracts that provide for the purchase and sale of the total amounts of given articles needed or [fol. 1166] required in an established enterprise over a definite period. (*Texas Co. vs. Pensacola Corp.*, 279 Fed. 19; *Pittsburgh Plate Glass Co. vs. Neuer Glass Co.*, 253 Fed. 161.) An obligation to produce and ship ore in good faith is clearly implied within the terms

of this contract. No personal choice or option is given to withhold or refuse deliveries. When the quantity is measured by the output, the Mammoth Company could not, without violating its contract, have escaped producing and delivering the ore. We find on this record, that the Mammoth Company carried out its promises under the terms of the contract. It completed the picking plant by March 5, 1915. This was done with reasonable dispatch. It was on March 17, 1915, that Beer, Sondheimer & Company repudiated the contract; their obligation was to buy the ore as soon as the picking plant was built. There were mutual promises to sell and buy all its ore, containing thirty-three per cent or more metallic zinc for a given period and this exclusively during a period of eighteen months. There was a promised option given Beer, Sondheimer & Company to purchase all the other grade zinc ores which the Mammoth Company might purchase. Thus there was sufficient consideration. (Munson S. S. Line vs. Grimwood, 273 Fed. 166; Ramey Lumber Co. vs. Schroeder Lumber Co., 237 Fed. 39.)

It is contended that the plaintiff seeking relief in a court of equity does so with unclean hands and the claim is that the Mammoth Company had previously to the making of the contract here in question, made a contract with another buyer for the exclusive sale of all the ore in question. It appears that the United States Smelting Company, with an office in Salt Lake City, was a subsidiary corporation of the U. S. Smelting, Refining & Mining Company, as was also the Mammoth Company, operating at Kennett in Shasta County, California. In June, 1914, the subsidiary company, the U. S. Smelting Company, made an ore selling contract with the American Metal Company. It is claimed that this contract covered the ore which was sold by the Mammoth Company to Beer, Sondheimer & Company. The fact appears to be that the contract with [fol. 1167] the American Metal Company was with the parent company, but the ore sold to Beer, Sondheimer & Company was sold by a separate corporate entity and the contract was made in good faith, and it is not in conflict with any rights accorded to the American Metal Company by reason of its contract with the parent company. Negotiations with the U. S. Smelting Company were made on behalf of the Mammoth Company for the sale of the ore in suit with the American Metal Company on two distinct occasions after the contract of June 10, 1914, had been made. Once was before the ore was sold to Beer, Sondheimer & Company, and the other time was after Beer, Sondheimer & Company had broken its contract and had refused to take the ore in question. We see nothing in these transactions which establishes the claim of mala fides. Further, the U. S. Smelting Company, being a separate and distinct entity, could not and did not make contracts for the Mammoth Company.

The plaintiff appeals, claiming that he is entitled to more interest than allowed him by the court below and also complaining of a deduction made for freight in estimating the damages sustained by him. This suit being in equity, the settled rule of this court is applicable that it will not interfere with an award of interest made by the trial court sitting in equity unless there has been a clear abuse

X of discretion. (Penn. Steel Co. vs. N. Y. etc. R., 198 Fed. 778.) The trial court awarded interest from the 3rd day of July, 1919, upon the amount of the damages as found by the master, this being the day when peace was established between this government and Germany. The theory of accepting this date was that because of the state of war existing between this country and Germany, business negotiations were suspended. Interest is awarded as damages and the Supreme Court has held that the rule of *lex fori* obtains. (Goddard vs. Foster, 84 U. S. 123.) The rule in this circuit is that no interest can be allowed at law where the damage is uncertain or unascertainable by computation at the time of the commencement of the action, or, in other words, where the damages are unliquidated. (Stephens vs. Phoenix Bridge Co., 139 Fed. 248.) But this [fol. 1168] court has held that in cases where it can be determined what amount is due either by mere computation or by computation in connection with established market values or other general recognized standards, interest may be allowed. (Demotte vs. Whybrow, 263 Fed. 366.) In Faber vs. City of New York (222 N. Y. 255) the State Court of Appeals said:

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. To-day, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computation alone or by computation in connection with established market values, or other generally recognized standards?"

In Insurance Company vs. Davis (95 U. S. 425) a resident of Virginia, who had been, before the war, a local agent of an insurance company, refused to receive the renewal premiums on a policy of insurance tendered him by a resident of that state. His refusal was based upon the ground that he had received no renewal receipts from the company without which he could not receive the premiums, and that the money, if received, would be liable to confiscation by the Confederate Government. The evidence failed to show that the company had consented to his continuing to act as such agent during the war or that he did so continue. The policy of insurance had an endorsement on the instrument that "all receipts for premiums paid at the agencies are to be signed by the President or Actuary" of the company. This was held to be merely a notice to the assured that he must not pay to an agent or at an agency, without getting a receipt signed by the president or actuary, and it was held that [fol. 1169] waiving the consideration of any question in regard to the validity of an insurance upon the life of an alien enemy, such tender of payment did not bind the company. The court said:

"We do not mean to say, that if the defendant had continued its authority to the agent to act in the receipt of premiums during the

war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such authority in case of war, made before its occurrence, would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent."

On June 29, 1916, after the resale of the goods, the Mammoth Company sued Beer, Sondheimer & Company in the District Court of Salt Lake County, State of Utah, and served an agent with a summons and complaint. This informed the agents who had theretofore represented the Beer, Sondheimer & Company of the demand of the Mammoth Company. This was set aside for the reason that it was decided the court did not have jurisdiction of the defendants. On the 29th of September, 1916, the plaintiff, as assignee of the same cause of action, brought an action in the Supreme Court of the State of New York in the County of New York against Beer, Sondheimer & Company and service was made upon their agents. The service of the summons and complaint in the Utah action was a sufficient demand to liquidate the plaintiff's claim, even if unliquidated, and to start interest running thereon. (*Dwyer vs. United States*, 93 [fol. 1170] Fed. 616; *Kaufman vs. Tredway*, 195 U. S. 271; *United States vs. Curtis*, 100 U. S. 119; *Tuzzeo vs. Bonding Co.*, 226 N. Y. 171.)

At the time of the commencement of these actions, the consequent damages to the plaintiff were complete and could be ascertained as of that particular time and in accordance with the fixed rules of evidence and then known standard of value because of the resale. The claim was presented and from that time on interest would run as damages and the trial court could (even in an action at law) have awarded the legal rate on the amounts for which judgment was awarded the plaintiff. The appeal was properly addressed to the discretion of the court of chancery. (*Penn. Steel Co. vs. N. Y. City Ry. Co.*, 198 Fed. 778; *Woerz vs. Schumacher*, 161 N. Y. 536.) It appears that Beer, Sondheimer & Company had agents with full authority in the United States from March 17, 1915, when they repudiated the contract, until July 12, 1918, when the custodian seized their property. Elkin and Frohnknecht were in complete charge of their American business. They had ample funds, in amount several millions. In August 1915, Beer, Sondheimer & Co., Inc., was organized and there was transferred to this corporation the American assets of the co-partnership of Beer, Sondheimer

& Company. In exchange for this property, all the stock of the newly formed corporation was issued to the German firm, and the assets were about four and a half million dollars. The Alien Property Custodian, after investigation, found that this corporation was organized for the sole purpose of defeating the rights of the United States government in the event of war with Germany and that the reported transfer of stock to Elkan and Frohnknecht was fraudulent and wholly void. He thereupon seized the property. Therefore, the state of war which followed between the United States and Germany could not have interfered with the transfer of property from Germany to this country so far as paying American creditors was concerned. And it further appears that between September 1, 1915, and February 3, 1917 Beer, Sondheimer & Company in the United States transferred to Beer, Sondheimer & Company at Frankfurt, two million and forty-seven thousand dollars. The last remittance of seven hundred thousand dollars was made on February 3, 1917, the day upon which the German Ambassador received his passport and left this country. Therefore, it appears that even though a state of war existed between April 5, 1917 and July, 1919, there was no valid reason why Beer, Sondheimer & Company should not be required to pay the interest on the plaintiff's demand. The demand having been presented in the form of a summons and complaint on June 29th, 1916, we think interest should run on the amount allowed by the court below as damages from that date.

In computing the damages, the master allowed \$42,201.50 as a saving in freight. The contract with Beer, Sondheimer & Company provided for delivery of the ore f. o. b. Bartlesville or any other point having an equal freight rate. On the resale of the ore, it was provided for delivery f. o. b. Altoona, Kansas, which had the same rate as from Kennett to Bartlesville. But there was a saving in the rate for the reason that the traffic rates depended upon the actual value per ton of two thousand pounds. The railroad company had no established market value to fix this rate and accepted the invoice price of the ore shipped. Below, it was held that the amount actually paid for transportation to Altoona was the correct basis for freight, but that if the same ore had been consigned to Beer, Sondheimer & Company at Bartlesville, the freight rate would have been based upon the invoice price of the ore under that contract, and this amounted to a difference of \$42,201.50. In point of fact, the railroad company in fixing the rate, was not obliged to go beyond the invoice price of the goods as stated, and would undoubtedly have accepted the value in the invoices if the goods had been shipped under the terms of the original contract. The resale prices minimized the loss to the extent of \$42,201.50 and we are of the opinion that Beer, Sondheimer & Company are entitled to this advantage.

The decree below will be modified so as to provide for interest from June 29th, 1916 and as thus modified the decree is affirmed.

[fol. 1172] At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 4th Day of January, One Thousand Nine Hundred and Twenty-three.

Present: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, Circuit Judges.

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

Decree

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified so as to provide for interest from June 29th 1916, and as thus modified the decree is affirmed.

C. M. H.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 1173] [File endorsement omitted.]

[fol. 1174] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that Thomas W. Miller, as Alien Property Custodian and Frank White, as Treasurer of the United States of America, defendants above named, by direction of the Attorney General of the United States, hereby appeal to the Supreme Court of the United States from the Decree made and entered by the United States Circuit Court of Appeals for the Second Circuit on the 4th day of January, 1923, modifying the Decree of the District Court of the United States for the Southern District of New York so as to provide for interest from June 29, 1916 and affirming the Decree as thus modified, and from each and every part of said De-

cree of said United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, March 15, 1923.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendant-Appellants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City. To the Clerk of the Circuit Court of Appeals for the Second Circuit; Stockton & Stockton, Esqs., Solicitors for Complainant, 2 Rector Street, New York City.

[fol.1174½] [File endorsement omitted.]

[fol. 1175] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR APPEAL WITH SUPERSEDEAS

The above-named defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, acting under the direction of the Attorney General of the United States, respectfully show that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a final decree therein has been rendered on the 4th day of January, A. D., nineteen hundred and twenty-three, modifying the decree of the District Court of the United States for the Southern District of New York, entered July 25th, 1921, so as to provide for interest from June 29th, 1916, and affirming said decree as thus modified, and further ordering and directing that a mandate issue to said United States District Court in accordance with said decree:

That the matter in controversy in said suit exceeds one thousand [fol. 1176] dollars, besides costs;

That the above-entitled cause is one in which the jurisdiction of the United States Circuit Court of Appeals is not final, as the construction of a statute of the United States is therein involved, viz: the "Trading with the Enemy Act" (40 Stat. 419), and that the cause is a proper one to be reviewed by the Supreme Court of the United States on appeal;

That your petitioners are aggrieved by said decree of said United States Circuit Court of Appeals for the Second Circuit, and desire that this appeal shall operate as a supersedeas and may suspend, during the pendency thereof, the effect of said decree of said United States Circuit Court of Appeals and likewise the effect of a decree

of said District Court, entered on the 22nd day of January, 1923, in accordance with said Mandate of said Circuit Court of Appeals;

That your petitioners are officers of the Government of the United States, sued herein as such, and are acting herein by direction of the Attorney General of the United States and of the Department of Justice, and are therefore required by statute to give no bond or other security pending this appeal.

Wherefore, your petitioners pray that an appeal be allowed them in the above-entitled cause that a citation be issued as provided by law, and that the Clerk of the United States Circuit Court of Appeals for the Second Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by said petitioners, the appellants, may be reviewed, and if error be found, [fol. 1177] corrected according to the laws and customs of the United States; and that said appeal may operate as a supersedeas and may suspend, during the pendency thereof, the effect of said decree of said Circuit Court of Appeals, and the effect of said decree of said District Court entered as aforesaid in accordance with the Mandate of said Circuit Court of Appeals.

Dated, New York, the 15th day of March, 1923.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City, N. Y.

[fol. 1177½] [File endorsement omitted.]

[fol. 1178] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

ORDER ALLOWING APPEAL AND SUPERSEDEAS

Upon reading the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, acting under the direction of the Attorney General of the United States, dated New York March 15, 1923 for an allowance of the appeal to the Supreme Court of the United States and on consideration of the Assignment of Errors presented therewith, it is

Ordered that the appeal as prayed for be and hereby is allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the Supreme Court of the United States; and it appearing that this appeal is taken by the direction of a Department

of the United States Government, to wit, the Department of Justice, it is further

Ordered that said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, [fol. 1179] Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, either to prosecute the same or to answer in damages or costs.

Dated, New York, March 15, 1923.

Martin T. Manton, Judge of the Circuit Court of Appeals for the Second Circuit.

[fol. 1179¹/₂] [File endorsement omitted.]

[fol. 1180] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS

Come now, the defendants, Thomas W. Miller, as Alien Property Custodian and Frank White, as Treasurer of the United States of America, and file the following assignments of error upon which they will rely upon their appeal from the decree made by this honorable Court on the 4th day of January A. D. 1923, and say that this honorable United States Court of Appeals for the Second Circuit, erred as follows, to wit:

First. In modifying the decree made in this case by United States District Court for the Southern District of New York on the 25th day of July, 1921, so as to allow interest against the defendants from June 29, 1916.

Second. In affirming said decree of said District Court in all other respects.

Third. In holding and deciding that the said District Court had jurisdiction in this cause, and in refusing to dismiss the bill of complaint [fol. 1181] upon the ground that said Court was without jurisdiction.

Fourth. In holding and deciding that the claim sued upon is a debt cognizable as such under the provisions of Section 9 of the Trading With The Enemy Act, and in refusing to dismiss the bill of complaint on the ground that it appears upon the face thereof that said claim does not constitute such a debt.

Fifth. In refusing to dismiss the bill of complaint upon the ground that the claim sued upon is not a debt which was owing to

the plaintiff or his assignor prior to October 6, 1917, and is, therefore, not a claim cognizable by the Court under the provisions of subdivision (e) of Section 9 of the Trading With The Enemy Act, as amended by the Act of June 5, 1920.

Sixth. In holding and deciding that the contract sued upon was valid and enforceable, and in refusing to hold that it was void and unenforceable for lack of mutuality, and that the complaint should be dismissed on that ground.

Seventh. In refusing to hold that the contract sued upon appears upon the face of the bill of complaint to be void and unenforceable for indefiniteness and that the complaint should have been dismissed upon that ground.

Eighth. In holding and deciding that the Mammoth Copper Mining Company was under an obligation to sell all the product which it might produce to Beer, Sondheimer & Co., and that it could not dispose of such product to any person other than said Company.

Ninth. In holding and deciding that the alleged contract sued upon was a "requirement contract".

[fol. 1182] Tenth. In holding and deciding that the named defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company, entered into a contract on the 29th day of September, 1914, with the Mammoth Copper Mining Co. of Maine, for the sale of the total production of zinc crude oil shipped by the said Mammoth Copper Mining Co. of Maine from these properties in Shasta County, California.

Eleventh. In holding and deciding that the Mammoth Copper Mining Company of Maine duly performed all of the obligations on its part to be performed under the terms of said alleged contract.

Twelfth. In holding and deciding that the agreement between the original parties thereto was not void for lack of consideration.

Thirteenth. In holding and deciding that the Mammoth Copper Mining Company did not breach the contract by failing to ship the ore "in as near as possible equal weekly quantities".

Fourteenth. In holding and deciding that the complainant in this cause came into equity with clean hands.

Fifteenth. In holding and deciding that the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer breached said alleged contract in March, 1915, by refusing to receive or accept from the said Mammoth Copper Mining Company of Maine further tonnages of ore tendered by the Mammoth Copper Mining Company of Maine, or pay therefor when tendered to the defendants.

[fol. 1183] Sixteenth. In holding and deciding that the complainant recover of the defendant Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, damages resulting from the refusal of said defendants to receive, accept and pay for the total production of zinc crude ore shipped by the said Mammoth Copper Mining Company of Maine, from its properties in Shasta County, California, during the period covered by the contract in suit dated August 26, 1914, together with his costs, charges and disbursements in this suit to be taxed.

Seventeenth. In holding and deciding that the defendants Thomas W. Miller, as Alien Property Custodian and Frank White as Treasurer of the United States of America pay over to the plaintiff from the property and money of said named defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, held by the said Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States the amount of damages, costs, charges and disbursements.

Eighteenth. In holding and deciding that the Court below did not err in appointing a special master to ascertain, take, state and report to the Court the amount of ores shipped by the said Mammoth Copper Mining Company of Maine from its properties in Shasta County, California, under the terms of said contract dated August 26, 1914, which said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer refused to accept, and the amount of damages which the plaintiff has suffered by reason of the alleged failure and refusal of said defendants to receive and accept and pay for said ore.

Nineteenth. In holding and deciding that the Court below did not err in making a decree which ordered, adjudged and decreed that [fol. 1184] the complainant recover of the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, damages in the sum of Two hundred fifty-nine thousand, five hundred ninety-seven and 21/100 (\$259,597.21) Dollars, together with the costs, charges and disbursements in this suit.

Twentieth. In holding and deciding that the Court below did not err in making a decree which ordered, adjudged and decreed that the defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States pay over to the plaintiff, from the property and money of said defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer held by said Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America, the sum of \$259,597.21 with interest from July 3, 1919, in the sum of \$31,800.60, together with the plaintiff's costs, charges and disbursements therein taxed at \$8,499.09, within ninety days after the entry of said order.

Twenty-first. In holding and deciding that the Court below did not err in making a decree which ordered, adjudged and decreed that

the plaintiff be allowed interest from the 3rd day of July, 1919, upon the amount of his claim as found by the special master.

Twenty-second. In holding and deciding that the Court below did not err in awarding to the complainant the costs in this suit to be taxed.

Twenty-third. In holding and deciding that the Court below did not err in confirming the Master's report and overruling the defendant's exceptions to the same.

[fol. 1185] Twenty-fourth: In holding and deciding that the first exception taken by these defendants to the report made in this cause by the Special Master under date of March 31, 1921, should not have been sustained, said exception being as follows, to wit: that the Master found and reported "that the plaintiff has suffered damages in the sum of Two hundred fifty-nine thousand, five hundred ninety-seven and 21/100 dollars (\$259,597.21) by reason of the failure and refusal of the defendants, Beer, Sondheimer & Company, to receive, accept and pay for the ore therein referred to," whereas the Master should have found and reported that the plaintiff had failed to establish any damages whatsoever.

Twenty-fifth: In holding and deciding that the second exception taken by these defendants to said report of said Special Master should not have been sustained; said exception being as follows, to wit: that the Master found and reported "that in the dealings between the Mammoth Copper Mining Company and the United States Smelting Company in regard to the ore in question, the said companies dealt as separate and independent legal entities, and are to be so considered for the purpose of this litigation; and that the transaction between said companies evidenced by three certain letters from W. H. Eardley to C. W. Metcalf, dated respectively July 21, 1915, March 8, 1916, and March 20, 1916, was a valid contract of sale of the ore in question by the Mammoth Copper Mining Company to the United States Smelting Company, and was entered into in good faith;" whereas the Master should have found and reported that in such dealings the said corporations did not act, and should not be regarded as separate and independent legal entities but as agents directed [fol. 1186] and controlled by a common principal, to wit, the Holding Company, and that the said transaction was not therefore a real sale or contract of sale.

Twenty-sixth: In holding and deciding that the third exception taken by these defendants to said report of said Special Master should not have not been sustained; said exception being as follows, to wit: that the Master found and reported "that the damages suffered by the plaintiff are measured by the difference between the amount which Beer, Sondheimer & Company would have paid under their contract and the amount paid by the United States Smelting Company pursuant to the so-called contract of resale (less freight in each case) without taking into account profits realized upon the ultimate disposition of the metals recovered from the ore," whereas the Master

should have taken such profits into consideration in reduction of the damages.

Twenty-seventh: In holding and deciding that the Mammoth Copper Mining Company and the United States Smelting Company dealt with each other as separate corporate entities in relation to the treatment by them of the ore in suit.

Twenty-eighth: In holding and deciding that the Court below did not err in permitting the complainant to amend his complaint after the trial, the entry of the interlocutory judgment and the assessment of damages thereunder, and just prior to the entry of the final decree, so as to claim a sum greater than that set forth in the original notice of claim filed by the complainant with the Alien Property Custodian.

Twenty-ninth: In refusing to hold that the Court below is and was without jurisdiction to award judgment in an amount greater than the amount of the alleged debt as set forth in the notice of [fol. 1187] claim filed by the claimant with the Alien Property Custodian pursuant to the provisions of the Trading with the Enemy Act and the amendments thereto.

Thirtieth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

Q. 37. Mr. Metcalf, you were asked yesterday about the picking plant which is mentioned in the contract here in dispute, and which you testified was constructed at an expense approximately of \$10,000, and completed as a matter of fact, March 5, 1915, although having previously given the date as February 23, 1915, to Beer, Sondheimer & Company, you adhered to that date. Will you state whether or not that picking plant would have been built by you if this contract had not been executed?

A. No.

Mr. Jerome: I do not think that is admissible.

The Court: I do not either. I will allow it, however, for what it is worth.

Mr. Jerome: Exception."

Thirty-first. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below refused to permit, over exceptions taken at the time as shown by the record, one George W. Metcalf to give testimony in response to the question put to him by counsel for defendants, as follows:

"Q. 88. How did your production run in the mine, say from August 26th up to the time of the repudiation of this contract?

Mr. Sutro: Just a moment, Mr. Jerome. If you will pardon me, the contract was dated August 26th, but was not executed until September 29th; that is the evidence here.

I do not see the materiality of it, your Honor, prior to the execution of the contract. The witness testified the first shipment made after its execution on September 29th was the first date here, November 28th, 1914 (referring to settlement sheets).

[fol. 1188] The Court: Confine yourself to that date.

Mr. Jerome: Then on my offer to show it from the 26th of August, the date of the contract, which is excluded, to that ruling I except, and we will go to the 29th of September."

Thirty-second. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below refused to permit, over exceptions taken at the time as shown by the record, one George W. Metcalf to give testimony in response to the question put to him by counsel for the defendants, as follows:

"Q. 147. During the year 1915 there was an extraordinary increase in the price of spelter; an unprecedented increase, was there not?"

A. Yes.

Mr. Sutro: To what time in 1915 do you refer, Mr. Jerome?

Mr. Jerome: I say during that year there was an increase.

Mr. Sutro: In March, 1915, Beer, Sondheimer & Company broke this contract. I do not see what difference it makes whether there was a rise in the price of spelter after that.

Objection sustained. Exception."

Thirty-third. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"X Q. 202. You knew that Beer, Sondheimer & Company would take all the ore it could get under this contract, did you not?"

Mr. Jerome: That is objected to as irrelevant, and thoroughly incompetent, what was in the mind of Beer, Sondheimer & Company, what they would take. They would take what they were obliged to take under this contract, and they would not take any more. I object to the question.

Objection overruled. Exception.

(a) It is my understanding that they wanted all of it that we could purchase."

[fol. 1189] Thirty-fourth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"X Q. 204. There are telegrams in evidence here, Mr. Metcalf, from Mr. Salinger to yourself, the first asking you to state what you expect your zinc tonnage to be for October, 1914, and your estimate for November, and you say, 'The zinc ore tonnage depends altogether

on market price of spelter.' Will you please explain what you meant by that reply?

Mr. Jerome: That is objected to as incompetent. The telegram speaks for itself; it is unambiguous.

Objection overruled.

A. I meant by that reply that I would go just as far as I could to meet the wishes of Beer, Sondheimer & Company in increasing the shipments, but that I was not willing to incur a great big expense, loss, in doing so."

Thirty-fifth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time as shown by the record, one George W. Metcalf to testify as follows:

"R. C. Q. 226. In that connection, Mr. Metcalf, I would like to ask you whether in June and July, 1914, when the zinc proposition at Kennett was first mentioned, whether or not you had in mind shipping that zinc as concentrates possibly, or as crude ore?

Mr. Jerome: That is objected to as wholly irrelevant. It was before the contract.

The Court: I will allow it.

Mr. Jerome: Exception.

A. We expected at that time to be able to concentrate that ore and ship it as concentrates, but we had tests made by people whom we thought were competent, and they reported that we could not concentrate the ore, and then we developed this method of sorting or picking the ore which was actually used. Subsequently, we ourselves, in March, 1915, found that it could be concentrated in a [fol. 1190] measure, and after that time used such apparatus in conjunction with our sorting plant."

Thirty-sixth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"C. Q. 46. I am asking you, was not the contract profitable or or was it not profitable to Beer, Sondheimer & Company? You tell me that it was profitable in January; was it profitable in February?

Mr. Jerome: I fail to see the relevancy of it. I object.

The Court: I will allow it.

Mr. Jerome: Exception.

A. The question of being profitable or not did not enter at all. It was a question of quantity."

Thirty-seventh. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time, as shown by the record, one W. H. Eardley to testify as follows:

"Q. 10. That is Mr. Putzel who was assistant manager of the Denver office of the American Metal Company in 1914. Did you have any negotiations with anyone looking to the making of this contract, dated June 10th, 1914. Defendants' Exhibit S?

A. Yes, sir, with Mr. Putzel.

Q. 11. Now, will you state to the Court, please, the circumstances and conditions concerning these negotiations?

Mr. Jerome: That is objected to as wholly irrelevant and self-serving declaration. This is the American Metal Company contract.

The Court: I will allow it.

Mr. Jerome: Exception.

A. Mr. Putzel wired me in May, 1914, requesting that I notify him when I was about to leave Salt Lake to take a trip to the northwest. In pursuance to that telegraphic correspondence, Mr. Putzel met me in Salt Lake City in May, 1914, and we together made a trip over the northwest territory, he buying zinc ores and I contracting lead ores for the United States Smelting Company, during this [fol. 1191] trip, Mr. Putzel stating this: 'Eardley, you are probably around the country all the time'—

Mr. Jerome: I do not see what relevancy this has got. This contract says, 'all the zinc sulphide crude ore, zinc sulphide concentrates and zinc sulphide middlings, shipped from Midvale, Utah, Kennett, California, or any other point by or under the control of the seller during the period of this agreement.'

The Court: I will allow it.

Mr. Jerome: Exception.

A. Mr. Putzel made this statement: 'Eardley, you are traveling now around the country west of the Rockies. You have men from your office out. Why not enter into a contract with us which would permit your people, your men, to pick up car loads of zinc ore here, there and everywhere, and ship to us. We are in need of zinc ores, not concentrates.' And while we were on that trip, we drew up a tentative agreement covering a small production of zinc middlings which we had over at Midvale, Utah, which were used as the basis of the contract, and then we included the words 'Kennett or any other point,' so we could ship under that contract any ores we may be able to pick up by purchase and sales agency contract, and the word 'Kennett' had the same significance as the words 'or any other point,' we first having to secure those ores from those points before we could ship them under this contract."

Thirty-eight. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"Q. 1. Mr. Metcalf, there has been before the Court here the much talked about contract between the American Metal Company and the United States Smelting Company, or turn it around, between the United States Smelting Company and the American Metal Company, dated June 10th, 1914. When did you first see that contract?

A. Late in the fall of 1919.

Q. 2. Now, will you please tell the Court how you came to see it?

Mr. Jerome: That is immaterial.

The Court: I will allow it.

Mr. Jerome: Exception.

A. When I was engaged in looking up the price, to get a fair price for the ore involved in this suit, I was endeavoring to get the terms given in as many other contracts for zinc ore up to that time as possible, and I went through the file of contracts in the Salt Lake office of the United States Smelting Company, and among others, I saw this particular contract, but I did not at that time get a copy of it further than making a memorandum as to the terms."

[fol. 1192] Thirty-ninth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below refused to admit in evidence over exceptions taken at the time, as shown by the record, three telegrams offered by the defendants and marked Defendant's Exhibit Q for identification, being respectively a telegram, dated May 25, 1915, to Beer, Sondheimer & Co. from the United States Smelting Co., and two telegrams, dated June 3, 1915, and May 31, 1915, from the United States Smelting Company to Beer, Sondheimer & Co.

Fortieth. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below refused to admit in evidence over exceptions taken at the time, as shown by the record, a letter offered by the defendants and marked Defendant's Exhibit R for identification, being a letter from the U. S. Smelting Company to National Zinc Company, Bartlesville, dated May 7, 1915.

Forty-first. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below admitted in evidence, over exceptions taken at the time, as shown by the record, Plaintiff's Exhibits 70 and 71, being respectively a letter from the U. S. Smelting Company to the American Metal Company, Ltd., dated July 23, 1914, and a letter from the U. S. Smelting Company to the American Metal Company, dated July 15, 1914.

Forty-second. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below admitted in evidence, over exceptions taken at the time, as shown by the record, Plaintiff's Exhibits 76A, being a letter dated July 28, 1914, from the U. S. Smelting Company to Mr. Schott, Manager, [fol. 1193] American Metal Company, 77A, being a letter dated July 20, 1914, from American Metal Company, Ltd., to U. S. Smelting Company, 78A, being a letter dated July 21, 1914, from Ameri-

can Metal Company, Ltd., to W. H. Eardley, 79A being a letter dated July 27, 1914, from U. S. Smelting Company to American Metal Company, Ltd., 80A being a letter dated July 20, 1914, from the American Metal Company, Ltd., to Mr. Eardley, 81 being a letter from Mr. Eardley to American Metal Company, dated August 4, 1914, 82 being a letter from the American Metal Company, Ltd., to Mr. Eardley, dated August 6, 1914, 83 being a letter from Mr. Eardley to American Metal Company, dated August 8, 1914, 84 being a letter from the American Metal Company to Mr. Eardley, dated August 12, 1914, 85 being a letter from Mr. Eardley to American Metal Company, dated August 14, 1914, 86 being a letter dated August 25, 1914, from Mr. Metcalf to Mr. Eardley, 87 being a letter dated March 25, 1915, from the United States Smelting Company to the American Metal Company, Ltd., 88 being a copy of letter dated March 25, 1915, from the U. S. Smelting Company to American Metal Company, Ltd., 89 being a letter dated April 1, 1915, from the American Metal Company, Ltd. to U. S. Smelting Company, 90 being a letter dated April 5, 1915, from U. S. Smelting Company to American Metal Company, Ltd., 91 being a letter dated April 14, 1915, from U. S. Smelting Company to American Metal Company, Ltd., 92 being a letter dated April 17, 1915, from American Metal Co., Ltd., to U. S. Smelting Co., 93 being a letter dated April 24, 1915, from American Metal Co., Ltd., to U. S. Smelting Co., 94 being a letter dated April 5, 1915, from Mr. Eardley to Mr. Metcalf, 95 being a letter dated April 10, 1915, from Mr. Metcalf to Mr. Eardley, 96 being a letter dated February [fol. 1194] 24, 1915, from Mr. Eardley to Mr. Metcalf, and 97 being a letter dated February 22, 1914, from Mr. Metcalf to U. S. Smelting Company, whereas in fact the above *emtioned* exhibits and each and all thereof, were incompetent, irrelevant and immaterial, as being *res inter alios acta* in no way binding upon the defendants in this cause.

Forty-third. In refusing to hold that prejudicial error had not been committed during the trial of this cause when the Court below permitted, over exceptions taken at the time, as shown by the record, the introduction of Plaintiff's Exhibits 65 and 66 into the evidence, which are respectively a telegram, dated January 27, 1915, addressed to Mr. Metcalf, signed Herbert Salinger, and a letter dated January 27, 1915, from Mr. Metcalf to Mr. Salinger, for the reason that it nowhere appears that Salinger had any authority to bind the defendants.

Forty-fourth. In refusing to hold that the Special Master had not committed prejudicial error when in the trial of the cause before him, he permitted over exceptions taken at the time, as shown by the record, one George W. Metcalf to testify as follows:

"Q. Did you state to Mr. Jerome that you considered that the freight rates you would have had to pay if you had continued shipping to Beer, Sondheimer & Company would have been based upon the value of the ore calculated under the terms of the Beer, Sondheimer & Company contract?

A. I believe I did say so.

Q. Would you consider that you would have had to pay that amount of freight if Beer, Sondheimer & Company had received the ore shipped by you, but had refused to pay for it?

Mr. Jerome: That is objected to. This is purely a question of law.

Overruled. Exception.

(Question read.)

A. I consider we would not."

Forty-fifth. In refusing to hold that the Special Master had not [fol. 1195] committed prejudicial error when in the trial of the cause before him, he permitted over exceptions taken at the time as shown by the record, one Walter H. Eardley to testify as follows:

"Q. Will you state under what agreement you received these ores from the Mammoth Copper Mining Company?

A. I wrote Mr. Metcalf a letter, I think it was on July 21st, advising him of the terms under which we would receive and pay for such ores.

Q. Will you state whether or not those terms were the——

The Master (interrupting): That is the letter that is in evidence as the contract between the Smelting Company and the Mammoth Copper Mining Company?

Mr. Stockton: That is the letter, yes.

Q. Will you state whether or not those terms represented the going terms for zinc ore?

A. In my opinion they did.

Q. In your opinion, could you have secured an equal amount of ore of the same quality from other concerns at as favorable a price as the United States Smelting Company paid for the Mammoth ore?

Mr. Tibbetts: Objected to; it is opinion evidence.

Objection overruled. Exception.

A. I would have purchased other ores which would have yielded the United Smelting Company as large a profit as the ores it received from the Mammoth Copper Mining Company."

Forty-sixth. In refusing to hold that the Special Master had not committed prejudicial error when in the trial of the cause before him, he permitted over exceptions taken at the time as shown by the record, one Walter H. Eardley to testify as follows:

"Q. At that time, could you have made toll contracts for ores similar to the Butte and Superior ores, upon terms more favorable to the United States Smelting Company?

Mr. Jerome: Objected to as purely hypothetical.

Objection overruled. Exception.

A. I made more contracts right after that on more favorable terms."

Forty-seventh. In refusing to hold that the Special Master had not committed prejudicial error in the trial of the cause before him when he admitted into the evidence, over exceptions taken at the [fol. 1196] time as shown by the record, Plaintiff's Exhibit 102, Plaintiff's Exhibits 101-a to 101-e, Plaintiff's Exhibits 103-a to 103-f and Plaintiff's Exhibit 33, all of which are respectively weights and analyses of products from stock piles 2 and 3, weights and analyses of product going into bins from April to July, 1915, weights and analyses of product from August, 1915, to January, 1916, and the product of Bin "C," the statement of lots 23, 24 and 25; and that these exhibits were inadmissible for the reason that they are secondary evidence and no proper foundation was laid for their introduction into evidence.

Forty-eight. In refusing to hold that the Special Master had not committed prejudicial error in the trial of the cause before him when he admitted into the evidence, over exceptions taken at the time as shown by the record, Plaintiff's Exhibit 118, being a series of vouchers purporting to show payments by United States Smelting Company to the Mammoth Copper Mining Company for certain ore shipments.

Wherefore the appellant-defendants pray that said decree of said Circuit Court of Appeals for the Second Circuit be reversed in all respects and things, and in order that the foregoing assignments of error may be made a part of the record, the appellant-defendants present the same to said Circuit Court of Appeals and pray that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such matter made and provided, all of which is respectfully submitted.

Dated, New York, the 15th day of March, 1923.

William Hayward, United States Attorney for the Southern District of New York, Solicitor for the Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Post Office Building, New York City.

[fol. 1196½] [File endorsement omitted.]

[fol. 1197] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit do hereby Certify that the foregoing pages numbered from 1 to 1196 inclusive, (in 2 vols.) contain a true and complete transcript of the record and proceedings had in

said Court, in the case of Frederick Y. Robertson, Plaintiff-Appellant-Appellee against Thomas W. Miller, as Alien Property Custodian etc., and another, Defendants-Appellants-Appellees, Nathan Sondheimer et al., Defendants-Appellees as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of March in the year of our Lord One Thousand Nine Hundred and twenty three and of the Independence of the said United States the One Hundred and forty-seventh.

William Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.

[fol. 1198] THE UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

CITATION—Omitted in printing

[fol. 1199] [File endorsement omitted.]

[fol. 1200] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that Frederick Y. Robertson the plaintiff above named, hereby appeals to the Supreme Court of the United States from the decree made and entered by the United States Circuit Court of Appeals for the Second Circuit on the 4th day of January, 1923, modifying the decree of the District Court of the United States for the Southern District of New York, so as to provide for interest from June 29, 1916, and affirming the decree as thus modified, insofar as said decree does not further modify the decree of the District Court of the United States for the Southern District of New York entered July 25, 1921, by directing that there should not be deducted from the amount of the damages due the plaintiff the difference between the freight actually paid by the plaintiff in disposing of the [fol. 1201] ore which is the subject matter of this suit and the freight which the Master estimated the plaintiff would have paid if said ore had been delivered to and accepted by the defendants Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil

Beer, copartners doing business under the firm name and style of Beer, Sondheimer & Company.

Dated: New York, March 28th, 1923.

Stockton & Stockton, Solicitors for Complainant, Office & Post Office Address 2 Rector Street, New York, N. Y. To the Clerk of the Circuit Court of Appeals for the Second Circuit; William Haywood, Esq., United States Attorney for the Southern District of New York, Solicitor for the defendant-appellees, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, Post Office Building, New York City.

[fol. 1201½] [File endorsement omitted.]

[fol. 1202] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

[Title omitted]

PETITION FOR APPEAL WITH SUPERSEDEAS

The above named plaintiff Frederick Y. Robertson, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a final decree therein has been rendered on the 4th day of January, A. D., nineteen hundred and twenty-three, modifying the decree of the District Court of the United States for the Southern District of New York, entered July 25, 1921, so as to provide for interest from June 29th, 1916, and affirming said decree as thus modified and further ordering and directing that a mandate issue to said United States District Court in accordance with said decree;

The matter in controversy in said suit exceeds one thousand dollars, besides costs.

The above entitled cause is one in which the jurisdiction of the United States Circuit Court of Appeals is not final, as the action is [fol. 1203] brought under and involves the construction of a statute of the United States, to wit: the "Trading with the Enemy Act" (40 Stat. 419), and that the cause is a proper one to be reviewed by the Supreme Court of the United States on appeal.

Your petitioner is aggrieved by said decree of said United States Circuit Court of Appeals for the Second Circuit, insofar as said decree does not further modify the decree of the District Court of the United States for the Southern District of New York, entered July 25, 1921, by directing that there should not be deducted from the amount of the damages due the plaintiff the difference between the freight actually paid by the plaintiff in disposing of the ore, which is the subject matter of this suit, and the freight which it is estimated the plaintiff would have paid if said ore had been delivered to and accepted by the said defendants, Beer, Sondheimer & Company.

Wherefore your petitioner prays that an appeal be allowed him in the above cause, that a citation be issued as provided by law, and that the clerk of the United States Circuit Court of Appeals for the Second Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said petitioner, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Dated, New York, the 28th day of March, 1923.

Stockton & Stockton, Solicitors for Plaintiff, Office & P. O.
Address #2 Rector Street, Borough of Manhattan, City of
New York.

[fol. 1203½] [File endorsement omitted.]

[fol. 1204] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

ORDER ALLOWING APPEAL

Upon reading the petition of Frederick Y. Robertson, and on consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be and hereby is allowed, and that a certified transcript of the record and proceedings be forthwith transmitted to the Supreme Court of the United States.

M. T. Manton, Justice of the Circuit Court of Appeals for
the Second Circuit. Dated: New York, March 28, 1923.

[fol. 1204½] [File endorsement omitted.]

[fol. 1205] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS

Comes now the plaintiff, Frederick Y. Robertson and files the following assignment of errors, upon which he will rely upon his appeal from the decree made by this honorable court on the 4th day of January, 1923, and says that this honorable Court of Appeals for the Second Circuit erred as follows, to wit:

I. In affirming the decree of said District Court, insofar as the court overruled the plaintiff's second exception to the report of the Special Master, to wit:

That the Master in said report stated and certified that in computing the amount of the plaintiff's damages by reason of the defendants' breach of contract, there should be taken into consideration the difference between the amount of freight which the plaintiff's assignor actually paid upon the shipment and resale of the ore involved in this suit and the sum which the Master estimated the freight charges would have amounted to if the contract sued [fol. 1206] on had been performed computed upon the basis of the price which the plaintiff's assignor was to receive for said ore under the terms of the Beer-Sondheimer contract, whereas the Master ought to have found that neither the freight actually paid by the plaintiff's assignor nor the amount which the Master estimated would have been paid for freight in the due performance of the contract with Beer, Sondheimer & Company should be taken into consideration in ascertaining the amount of the plaintiff's damages.

II. In affirming the decree of said District Court insofar as the same ordered, adjudged and decreed that a larger allowance for freight should be deducted from the amount due the plaintiff's assignor under its contract with the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company than was actually paid by the plaintiff's assignor upon the resale of the ore refused by the defendants, Nathan Sondheimer, Albert Sondheimer, Leo Wershner, Ludwig Beer and Emil Beer, co-partners doing business under the firm name and style of Beer, Sondheimer & Company.

Wherefore the plaintiff appellant prays that said decree of said Circuit Court of Appeals be modified in said respect, and that it be affirmed in all other respects and things, and in order that the foregoing assignments of error may be made a part of the record, the plaintiff appellant presents the same to said Circuit Court of Appeals and prays that such disposition may be made thereof, as is in accordance with the statute of the United States in such manner made and provided, all of which is respectfully submitted.

Stockton & Stockton, Attorneys for Plaintiff-Appellant, Office
& P. O. Address 2 Rector Street, Borough of Manhattan,
City of New York.

[fol. 1206½] [File endorsement omitted.]

[fols. 1207-1208 $\frac{1}{4}$] UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

BOND ON APPEAL FOR \$250—Filed and approved Mar. 29, 1923;
omitted in printing

[fol. 1208 $\frac{1}{2}$] [File endorsement omitted.]

[fol. 1209] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated between the solicitors for the parties to this appeal that the certified copy of the record on appeal used on the hearing of this case in the Circuit Court of Appeals shall constitute the transcript of record on appeal to the Supreme Court of the United States, and that said record shall constitute the transcript of the record on appeal both for the appeal taken by Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Defendants-appellants-appellees, and for the appeal taken by Frederick Y. Robertson, Plaintiff-appellant-appellee.

Stockton & Stockton, Attorneys for Plaintiff-Appellant-Appellee. Wm. Hayward, United States Attorney, Attorneys for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, Defendants-Appellants-Appellees.

[fol. 1209 $\frac{1}{2}$] [File endorsement omitted.]

[fols. 1210-1212] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 11 inclusive, contain a true and complete supplement to the transcript of the record and proceedings had in said Court, in the case of Frederick Y. Robertson, Plaintiff-Appellant-Appellee, v. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer, etc., Defendants-Appellants-Appellees,

Nathan Sondheimer, et al., Defendants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of April in the year of our Lord One Thousand Nine Hundred and twenty three and of the Independence of the said United States the One Hundred and forty seventh.

Wm. Parkin, Clerk. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

[fol. 1213] THE UNITED STATES OF AMERICA,
Second Circuit:

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Citation omitted in printing.

[fol. 1214] [File endorsement omitted.]

Copy received this 28th day of March, 1923.

Wm. Hayward, United States Attorney, Solicitor for Deft.
Thomas W. Miller, as Alien Property Custodian.

[fol. 1214½] [File endorsement omitted.]

[fol. 1215] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

STIPULATION RE SUPPLEMENTAL TRANSCRIPT

It is hereby stipulated between the attorneys for the parties hereto that a supplemental transcript of record in the above case, containing the following papers:

1. Notice of appeal by plaintiff-appellant-appellee;
2. Citation of appeal of plaintiff-appellant-appellee dated March 28, 1923;
3. Order of Honorable Martin P. Manton, allowing appeal of plaintiff-appellant-appellee dated March 28, 1923;
4. Assignments of error on appeal of plaintiff-appellant-appellee;

5. Stipulation that record already filed shall constitute the record for both appeals dated April 10th, 1923;

6. Copy of bond of National Surety Company for costs on appeal of plaintiff-appellant-appellee;

7. Certificate of Clerk of Circuit Court of Appeals of plaintiff-appellant-appellee dated April 18, 1923;

shall be added to and made a part of the original transcript of record filed by the defendants-appellants-appellees under Docket No. 966 [fol. 1216] October Term, 1922 and that both the appeal- prosecuted by the defendants-appellants-appellees and that prosecuted by the plaintiff-appellant-appellee shall be heard on said transcript of record.

Charles W. Stockton, Attorneys for Plaintiff-Appellant-Appellee. James M. Beck, Solicitor General, Attorney for Defendants-Appellants-Appellees. H. Dated: New York, May 1, 1923.

Endorsed on cover: File Nos. 29,516, 29,803. U. S. Circuit Court of Appeals, Second Circuit. Term No. 273. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, appellants, vs. Frederick Y. Robertson, Filed April 3rd, 1923. Term No. 493. Frederick Y. Robertson, appellant, vs. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America. Filed August 10th, 1923. File Nos. 29,516, 29,803.

(892)

End

